Antitrust Chronicle

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Consent Decrees

CPI COMPETITION POLICY® INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

This Chronicle focuses on the U.S. antitrust authorities' evolving approach to consent decrees as a means to resolve merger investigations. Recent years have seen rapid policy and practice changes at both the Federal Trade Commission ("FTC") and the Antitrust Division of the United States Department of Justice ("DOJ"). Parties seeking to enter a settlement with the agencies have encountered new (and unfamiliar) policies in seeking merger approval. The pieces in this Chronicle outline and critically evaluate these changes.

To open, **Alicia J. Batts & Alison M. Agnew** assess the landscape as it stands three years into the Biden Administration. Multiple agency policies and guidelines have been rescinded and proposed since 2021. The authors examine the impact of these changes on agency practices and enforcement actions. The piece argues that recent years have seen aggressive moves by the agencies, in terms of asking for increasing amounts of information and seeking more cumbersome terms. To illustrate the policy shifts, the piece examines recent merger settlements and so-called "fix-it-first" attempts by merging parties under the agency practices as they now stand.

Often, the appropriate remedy in a merger case will involve prior agency approval of later transactions by the buyer in the market in issue. As **Jonathan Jacobson** explains, from 1995 through 2022, FTC policy was to assess on a case-by-case basis whether such prior approval was needed. This policy changed in 2022, when the FTC adopted a requirement for prior approval in all cases and, beyond that, extended the requirement to adjacent markets. The author argues that the new policy is misguided. The piece traces the history of the seminal Coca-Cola/Dr Pepper proceedings that led to the now-abandoned 1995 policy. In the authors' view, the current policy is emblematic of the current FTC's hostility to merger activity more generally.

Leon B. Greenfield, Hartmut Schneider & Jonathan R. Wright build on this theme. In their view, under their current leadership, the U.S. federal antitrust agencies have shown antipathy to resolving merger investigations through remedy undertaking that are embodied in consent decrees, preferring instead to seek to prohibit transactions outright. This policy shift is leading merging parties increasingly to contemplate "fix-it-first" strategies, whereby the parties modify the proposed transaction to address antitrust concerns — typically by reaching an agreement with a buyer of assets to be divested — without entering a consent decree with the agency. The article discusses the implications of the agencies' new positions and the potential benefits and challenges of a fix-it-first strategy for merging parties.

Michael Murray emphasizes that the Antitrust Division has taken pains to defend its consent decree practices against charges that it engages in "shadow" settlements. Arguably, the antitrust bar is entitled to know the substantive reasoning behind the Antitrust Division's decision-making regarding challenging or settling merger matters. But in the author's view, the premise of this argument is flawed.

Christopher A. Williams, Tiffany Lee & Nick Marquiss argue that the DOJ and FTC have taken a markedly different approach to merger remedies, with the FTC settling mergers with traditional divestiture remedies at a significantly higher rate than the DOJ. The authors provide several reasons to explain why the agencies have taken varying approaches to settlement agreements. The offer pragmatic "practice tips" for parties interested in pursuing mergers in the new enforcement environment.

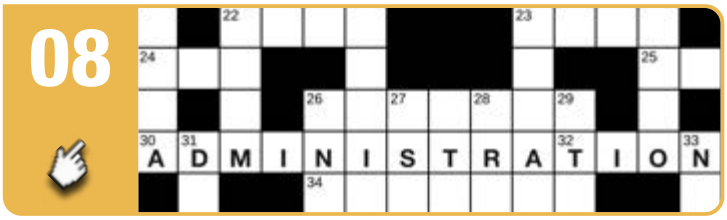
Finally, **Meredith Rose** analyzes emblematic cases concerning two licensing groups, namely ASCAP and BMI. The cases, both of which involved consent decrees, date back to 1941 and, though they are periodically updated, they have remained remarkably resilient, surviving through eight decades, fifteen Presidential administrations, numerous reviews, and dramatic changes in policy. These seemingly evergreen decrees provide a vital window into how intellectual property and competition policy intersect.

In sum, consent decrees have historically provided a pragmatic means for the U.S. agencies to resolve potentially thorny merger cases. But recent policy changes have called into question the viability of consent decrees for merging parties to bring merger investigations to a timely end. As merging parties and practitioners navigate the new landscape, the set of articles in this Chronicle provide valuable insight, constructive policy criticism, and practical guidance. As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

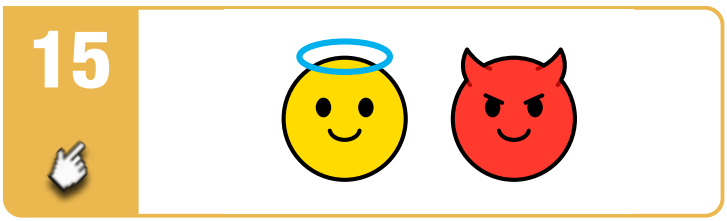
SUMMARIES



CONSENT DECREES UNDER THE BIDEN ADMINISTRATION

By Alicia J. Batts

Now that we are three years into the Biden Administration and multiple agency policies and guidelines have been rescinded and proposed, this article examines the impact of these new or, in some cases, revitalized Biden Administration competition policies on recent agency practices and enforcement actions. Without a doubt, significant, rapid policy and practice changes have occurred at both the Federal Trade Commission and the Antitrust Division of the United States Department of Justice, and parties seeking to enter a merger settlement with the government have encountered more aggressive regulators asking for more information and seeking more cumbersome terms. We examine recent merger settlements and "fix-it-first" attempts by merging parties under the current antitrust regime.



THE FTC'S PRIOR APPROVAL MISCHIEF

By Jonathan Jacobson

Sometimes, the appropriate remedy in a merger case will involve a requirement for prior agency approval of later transactions by the buyer in the market in issue. From 1995 through 2022, the Federal Trade Commission's policy was to assess on a case-by-case basis whether prior approval was actually needed. That changed in 2022, when the FTC adopted a requirement for prior approval in all cases and extended the requirement to adjacent markets. This paper explains why the new policy is misguided and traces the history of the *Coca-Cola/Dr Pepper t*ransaction that led to the now-abandoned 1995 policy. There, after the merger was abandoned and the case found moot by the D.C. Circuit, the FTC nevertheless insisted on litigating the moot case through a long trial and appeals. Coke could not settle because a one-sided prior approval requirement would effectively cede all future acquisitions to Pepsi. And Dr Pepper had found new owners in what is now *Keurig/Dr Pepper/Snapple/7-Up*. The 2022 policy is another example of the current FTC's hostility to all mergers.

FIX-IT-FIRST: A SEISMIC SHIFT IN U.S. ANTITRUST AGENCY APPROACHES TO MERGER REMEDIES

By Leon B. Greenfield, Hartmut Schneider & Jonathan R. Wright

Under their current leadership, the U.S. federal antitrust agencies have shown antipathy to resolving merger investigations through remedy undertaking that are embodied in consent decrees, preferring instead to seek to prohibit transactions outright. This sea change in merger enforcement policy is leading merging parties increasingly to contemplate "fix-it-first" strategies, whereby the parties modify the proposed transaction to address antitrust concerns — typically by reaching an agreement with a buyer of assets to be divested — without entering a consent decree with the agency. The agency is then left with the choice of either clearing the transaction or litigating over the adequacy of the remedy. In this article, we discuss the background and implications of the agencies' new positions and the potential benefits and challenges of a fix-it-first strategy for merging parties.

"SHADOW" SETTLEMENTS AND THE TUNNEY ACT

By Michael Murray

The U.S. DOJ Antitrust Division has taken pains to defend its consent decree practices against charges that it engages in "shadow" settlements. The premise of these "shadow" criticisms is that the antitrust bar is entitled to know the substantive reasoning behind the Antitrust Division's decision-making regarding challenging or settling merger matters. This article discusses the origins of that premise and argues that the premise is flawed.

SUMMARIES

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ROOM FOR AGREEMENT? ANTITRUST MERGER CONSENT DECREES POLICY AND PRACTICE UNDER THE BIDEN ADMINISTRATION

By Christopher A. Williams, Tiffany Lee & Nick Marquiss

Antitrust regulators at the Department of Justice Antitrust Division and the Federal Trade Commission have called to end what they perceive as an era of lax antitrust enforcement, challenging mergers in court instead of settling them with traditional remedies, such as divestitures of business assets. But despite these public pronouncements, this article shows, first, that the DOJ and FTC have taken a markedly different approach to merger remedies in practice, with the FTC settling mergers with traditional divestiture remedies at a significantly higher rate than the DOJ. This article offers several reasons explaining why the two agencies have taken different approaches to settlement agreements. We also show that federal and state antitrust authorities are more closely coordinating their approach to merger control under the new FTC and DOJ leadership. Finally, we conclude with several "practice tips" for parties interested in pursuing mergers in this new enforcement environment.

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MARKET POWER AND COPYRIGHT: THE ASCAP AND BMI CONSENT DECREES

By Meredith Rose

In 2016 — and again in 2019 — the Department of Justice declined to rescind or modify two of its longest-standing consent decrees. The decrees at issue govern the conduct of two music licensing groups: the American Society for Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). The decrees date back to 1941 and, though they are periodically updated, have nevertheless remained standing through eight decades, fifteen Presidential administrations, numerous reviews, and dramatic changes in DOJ attitudes toward consent decrees generally. The ASCAP and BMI consent decrees provide an interesting window into how intellectual property and competition policy intersect, including how market power turns on copyright exclusivity, increased efficiency, and the ability of intermediaries to stand in between rights holders and licensees.

WHAT'S NEXT?

For December 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Right to Repair**; and (2) **CRESSE Special Edition**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2024, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES January 2024

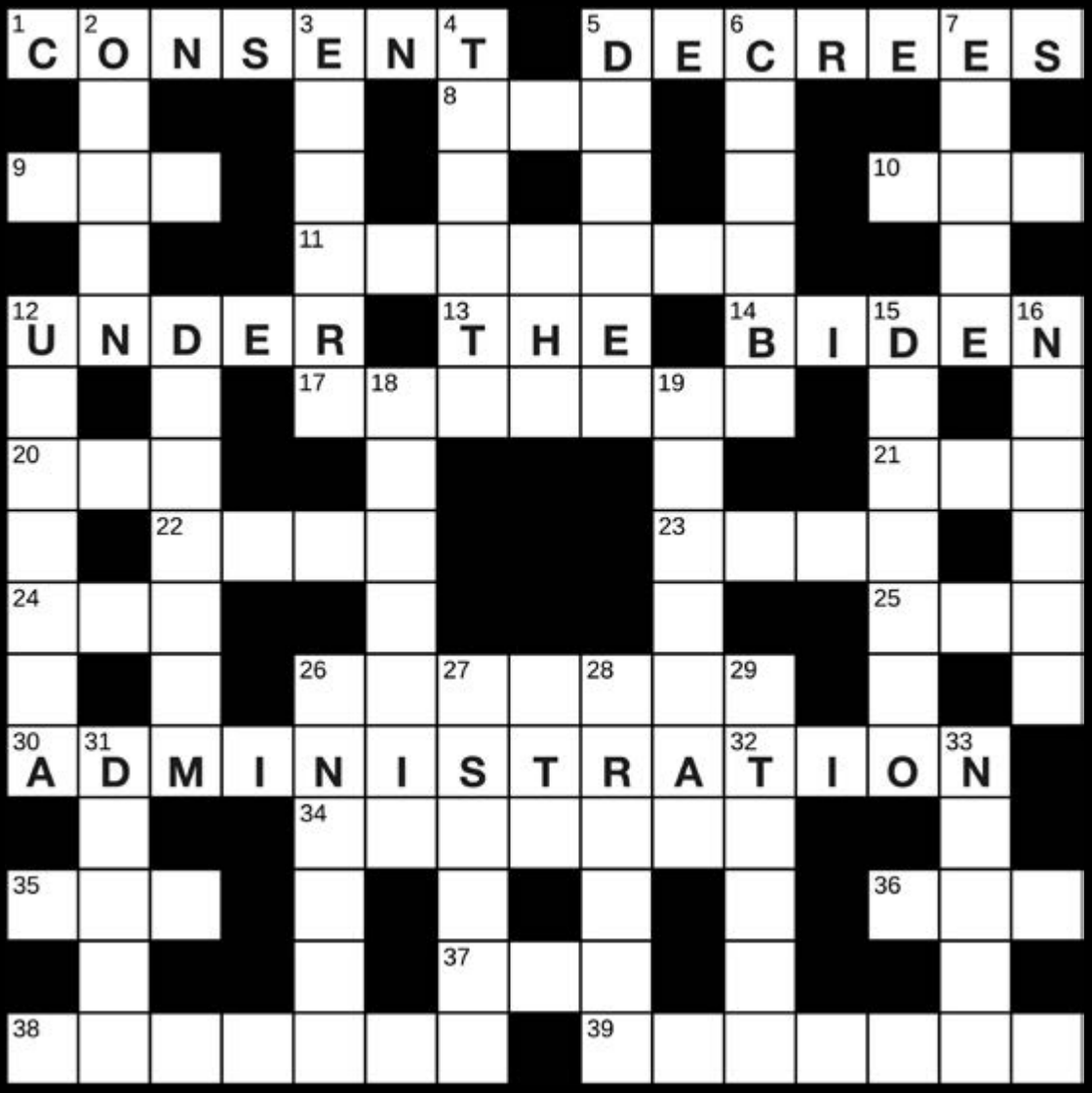
For January 2024, we will feature an Antitrust Chronicle focused on issues related to (1) **Non-Price Effects of Mergers**; and (2) **Rule(s) of Reason**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CONSENT DECREES UNDER THE BIDEN ADMINISTRATION



BY ALICIA J. BATTS & ALISON M. AGNEW [1]

1 Alicia Batts is Partner, Faegre Drinker Biddle & Reath LLP, and Alison Agnew is an associate at the Firm.

I. BIDEN ADMINISTRATION ANTITRUST POLICY

On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy (the "Order"), a wide-ranging edict intended to promote competition in numerous sectors of the economy through 72 specific initiatives.[2] As announced in the Order, the "policy of [the Biden] Administration [is] to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony."[3] The Order instructs numerous federal agencies, including the primary antitrust enforcers, to undertake multiple actions to implement President Biden's campaign goals of "fair competition" through "full and aggressive enforcement of [U.S.] antitrust laws," and to address the effects of consolidation, "abusive actions by monopolies" and "bad mergers" in several areas of the economy.[4]

Consistent with the Biden Administration's new objectives, the practices and rhetoric of the antitrust enforcement agencies immediately changed. When the new leaders of President Biden's antitrust enforcement agencies began their respective tenures at the DOJ and the FTC, they pledged a firm commitment to litigate anticompetitive transactions and limit the agencies' long-standing policy of entering into consent decrees with merging parties to address the potential anticompetitive consequences of a transaction. United States Assistant Attorney General Jonathan Kanter, in charge of the DOJ Antitrust Division, noted that the Division's "duty is to litigate, not settle, unless a remedy fully prevents or restrains the violation. It is no secret that many settlements fail to preserve competition."[5] AAG Kanter went on to state:

> *"At the Department of Justice, we are law enforcers. It is not our role to micromanage corporate decision-making under elaborate consent decrees. It is our job to enforce the law. And when we have evidence that a defendant has violated the law, we will litigate to remedy the entire harm to competition. That will almost always mean seeking an injunction to stop the anticompetitive conduct or block an anticompetitive merger."* [6]

Although FTC Chair Lina Khan did not pledge to litigate against all anticompetitive mergers, she similarly stated that "[the FTC is] going to be focusing our resources on litigating, rather than on settling" in a June 2022 interview.[7] Among other things, under Chair Khan's leadership, the FTC has been aggressively enforcing its authority to strengthen its use of Section 5 of the FTC Act to prohibit "unfair methods of competition."[8] In August 2021, Chair Khan wrote to U.S. Senator Elizabeth Warren (D-MA) to express her "skepticism about the efficacy of behavioral remedies. Indeed, both research and experience suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction."[9] In addition, Chair Khan subsequently testified to the Senate Judiciary Antitrust Subcommittee that "[t]here absolutely has been a problem with companies treating FTC orders as suggestions." [10]

II. BACKGROUND

Both agencies have long held the authority to resolve potential competition concerns by negotiating a consent decree or settlement with the merging parties — before or after a Second Request is issued or litigation challenging the transaction is initiated.

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2 The White House, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

3 *Id.*

4 *Id.*

5 Prepared Remarks, Antitrust Enforcement: The Road to Recovery, Apr. 21, 2023.

6 *Id.*

7 Axios interview, FTC's new stance: Litigate, don't negotiate, June 8, 2022.

8 FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

9 Letter to United States Elizabeth Warren from FTC Chair Lina Khan, dated Aug. 6, 2021.

10 Chair Khan's testimony before the Senate Judiciary Antitrust Subcommittee on Sept. 20, 2022. https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf. See e.g. John E. Kwoka & Diana L. Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, 57 ANTITRUST BULL. 1, 24 (2012).

Both agencies also have the authority to initiate investigations when there is reason to believe parties have violated the terms of a consent agreement. The majority of consent decree enforcement actions occur through nonpublic administrative actions and result in a modification and/or extension of the original settlement. On the relatively rare occasions that enforcement of consent decrees has led to litigation, courts have upheld the agencies' right to demand the orders be followed.[11]

Although the FTC does not have criminal jurisdiction the Commission has broad remedial powers to write and enforce orders,[12] and the FTC Act authorizes the Commission to obtain civil penalties for violations of a Commission order.[13] The FTC Act authorizes the Commission to obtain civil penalties for violations of a Commission order.[14] The Commission has broad remedial powers to write and enforce orders.[15]Civil penalties for order violations can be substantial, with current maximum penalties of $50,120 per violation per day.[16] The Commission's proposed settlements and consent decrees are put out for public comments for 30 days.[17] After evaluating any comments and weighing potential modifications, the FTC enters its final settlement orders. Over the years, the FTC has vigorously enforced existing Commission orders and obtained significant civil penalties for order violations.[18]

The DOJ has the authority to bring criminal and civil contempt claims for violation of consent decrees and seek, among other relief, civil penalties, injunctive relief, and imprisonment. Since March 2022, the DOJ has been revising the Antitrust Division Manual which, among other things, provides guidance to staff with regard to investigating and litigating claims for violating a Division consent order.[19] Unlike the FTC, 15 U.S.C. § 16 (popularly referred to as the Tunney Act) requires judicial approval for DOJ to enter into a consent agreement.[20] Pursuant to the Tunney Act, a federal district court holds a hearing and approves a DOJ settlement if it is deemed in the public interest. In heavily litigated mergers, Tunney Act hearings can be lively and complex with third parties motioning to intervene in the hearing.

III. RAPID CHANGES IN LONG-STANDING POLICIES

Despite the agencies' authority to enter into settlements and consent decrees, since the Biden Administration, the FTC and DOJ have been less interested in negotiating consent decrees and more interested in enforcing existing decrees and expanding the scope of new decrees.

One of Chair Khan's first policy changes at the FTC was to implement a series of enforcement resolutions that would authorize FTC staff to use "compulsory process," such as civil investigative demands and subpoenas, to investigate firms that are subject to an FTC order to determine whether the firms have violated the FTC decree or engaged in related or similar anticompetitive conduct. [21] These changes allowed staff to investigate potential violations by issuing CIDs not just to the firms subject to a consent decree, but also to other industry participants and expanded the scope of such investigation to violations adjacent to the subject of the consent decrees.[22]

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11 See *U.S. v. Boston Scientific*, 253 F. Supp. 85, 101 (D. Mass. 2003). The Supreme Court has recognized that the FTC is an expert body with wide latitude to design remedies. See *Jacob Siegel Co. v. Fed. Trade Comm'n*, 327 U.S. 608, 613 (1946); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957).

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13 15 U.S.C. §§ 45(l) and 56 (a)(l) as amended.

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16 Press Release, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023. https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023.

17 16 C.F.R. § 2.34(c) as amended. (Providing for a public comment period of 30 days, or some other period that the Commission may specify).

18 See e.g. Press Release, FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (Jul. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

19 Division Manual removed for updating March 2022, https://www.justice.gov/atr/division-manual.

20 15 U.S.C. § 16, as amended.

21 Press Release, FTC Authorizes Investigations into Key Enforcement Priorities, July 1, 2021.

22 Prepared Remarks of Commissioner Rohit Chopra (1 July 2021), at 1–2, available at https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/prepared-remarks-commissioner-rohit-chopra-regarding-adoption-repeat-offender-enforcement-resolution.

Another significant change came in July 2021, when the FTC returned to its long-standing policy of requiring merging parties to agree to prior notice and approval of future acquisitions in FTC consent decrees. After foreshadowing the policy change in public statements, the Commission voted to rescind the 1995 Policy Statement on Prior Approval and Prior Notice Provisions ("1995 Statement").[23] The model merger consent decree now requires merging parties to notify and obtain prior approval from the FTC about future transactions in the market covered by the decree for a period of 10 years, including non-reportable transactions.[24]

The reinstitution of prior notice and prior approval provisions of FTC consent order has had significant market implications, merging parties have to convince the FTC that a proposed transaction does not violate the antitrust laws instead of the FTC having the burden of proving a transaction is anticompetitive after an HSR is filed or the agency becomes aware of the transaction. [25]The FTC has used this policy change to inhibit private equity, healthcare, and technology companies, among other market consolidators, from using roll-up acquisitions – often below the HSR threshold or with little market impact as a stand-alone transaction to inhibit parties entering a consent agreement to continue purchasing in a market without government antitrust review.[26]

In 2020, toward the end of the Trump Administration, the Antitrust Division established an Office of Decree Enforcement and Compliance and drafted model decree provisions. At present, the Division requires companies entering into a merger consent decree to expressly agree to lowering the evidentiary standard for a decree enforcement action; reimbursing the DOJ for its investigatory and litigation costs if the DOJ prevails; and extending the term of the decree if it is violated.[27]

IV. BIDEN CONSENT DECREES AND FIX-IT-FIRST DIVESTITURES

To date, during the Biden Administration, Chair Khan and AAG Kanter have entered into a relatively small number of consent decrees. However, through negotiation or court decisions, both agencies have had to accept fix-it-first remedies. Reviewing the consent decrees that the agencies have entered into provides some insight into the agencies' current position. One thing is certain: if a consent decree or fix-it-first remedy is reasonable, the FTC and DOJ will still enter into or risk being judicially forced to litigate the fix.

A. FTC

Kroger/Albertsons: In October 2022, Kroger announced its plan to buy one of its largest competitors Albertson Companies, Inc. for $24.6 billion and create two complementary organizations to provide consumer retail and digital channels for food supply. Kroger pledged to update Albertson stores and bring value to consumers.[28] The combined company would control approximately a quarter of US retail food stores, and there was a massive public outcry from state Attorneys General, advocacy groups, Capitol Hill, and the public.[29] Numerous states and advocacy groups opposed the blockbuster transaction.[30] Kroger and Albertson proposed a fix-it-first divestiture[31] including , an agreement with C&S Wholesale Grocers Inc. to offload a minimum of 413 stores across 17 states and the District of Columbia in an all-cash transaction. .[32] The FTC is still investigating and meeting with the public about the proposed transaction. A decision will be made in 2024.

23 STATEMENT OF THE COMMISSION ON USE OF PRIOR APPROVAL PROVISIONS IN MERGER ORDERS, July 21, 2021.

24 See JAB Consumer Partners/National Veterinary Associates/SAGE Veterinary Partners, In the Matter of. FTC's consent order includes broad provisions requiring the private equity acquirer to receive prior approval for future acquisitions of clinics within 25 miles of an existing owned clinic anywhere in California or Texas. The order also requires prior notice of future acquisitions of clinics within 25 miles of an existing owned clinic anywhere in the United States.

25 See also DOJ requiring prior approval and notice. Proposed Final Judgment at 25–26, *United States v. Gray Television, Inc. et al.*, No. 1:21-cv-02041 (DDC 28 July 2021), available at https://www.justice.gov/opa/press-release/file/1418006/download.

26 Chair Khan's testimony before the Senate Judiciary Antitrust Subcommittee on Sept. 20, 2022.

27 DOJ, Press Release, 'Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division's Civil Enforcement Program' (20 August 2020), at 1 [DOJ Reorganization Press Release], available at www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil.

28 Kroger and Albertsons Companies Announce Comprehensive Divestiture Plan with C&S Wholesale Grocers, LLC in Connection with Proposed Merger, September 8, 2023.

29 See Supermarket News, Former FTC policy director: Kroger, Albertsons merger is facing 'a hurricane storm', dated October 02, 2023. https://www.supermarketnews.com/retail-financial/former-ftc-policy-director-kroger-albertsons-merger-facing-hurricane-storm.

30 See Letter to FTC Chair Khan from American Antitrust Institute dated Feb. 7, 2023. https://www.antitrustinstitute.org/wp-content/uploads/2023/02/Kroger-Albertsons_Ltr-to-FTC_2.7.23.pdf Ultimately, both Consumers and seven states filed actions, respectively, to block the merger.

31 See International Center for Law and Economics paper, Five Problems with a Potential FTC Challenge to the Kroger/Albertsons Merger, highlighting problems the FTC would potentially encounter in seeking to enjoin the transaction. https://laweconcenter.org/wp-content/uploads/2023/07/Kroger-Albertsons-Merger.pdf.

32 *Id.*

Black Knight/Intercontinental Exchange: In April 2023, FTC challenged the $13 billion takeover of mortgage data company Black Knight by financial services giant Intercontinental Exchange (ICE). The FTC alleged the deal reduced competition in key areas of the mortgage origination process and led to both higher home prices for consumers and competitors in the mortgage data and services industry.[33]

In September 2023, the parties entered into a consent decree with the FTC to resolve these concerns.[34] According to the FTC's Director of the Bureau of Competition, Henry Lui, "the Commission's order provides structural relief and a variety of tools to preserve competition in these critical markets."[35] The FTC consent order is consistent with the agency's new policies and requires the parties to commit to stringent restrictions and obligations that the FTC deems necessary to promote the success of the divested businesses.[36] Under the terms of the order, Black Knight's Optimal Blue business and Empower business, along with certain related products, will be divested to Constellation Web Solutions Inc. (Constellation), a provider of mortgage-related tools and software.[37] Along with agreeing to support the business and provide transition assistance, the consent order also requires ICE and Black Knight, for the next 10 years, to seek prior approval from the FTC before either reacquiring any divested asset or acquiring an interest in a loan origination system business.[38] Unsurprisingly, the order also requires ICE to provide prior notice to the FTC before acquiring an interest in a product, pricing, and eligibility engine business for that same period.[39]

Horizon/Amgen: In May 2023, the FTC filed its first challenge to a pharmaceutical merger in recent history when it voted 3-0 to block Amgen Inc.'s ("Amgen") $27.8 billion proposed acquisition of Horizon Therapeutics plc ("Horizon").[40] Noting that the "deal would allow Amgen to leverage its portfolio of blockbuster drugs to entrench the monopoly positions of Horizon medications used to treat two serious conditions, thyroid eye disease and chronic refractory gout," the FTC sought to litigate on an untested, cross-market theory and signify to the pharmaceutical industry that a new sheriff is in town.[41] The FTC's complaint was a clear break from the past agency practice of reviewing the competitive effects of a pharmaceutical merger on the basis of individual indication, and it represents the first time the FTC has brought an action based on a pharmaceutical company's ability to use its monopoly power through "bundling" certain blockbuster drugs to restrict competition and raise prices. [42] Specifically, the FTC alleged that the transaction would enable Amgen to engage in cross-market bundling by offering rebates on its existing drugs to insurance companies and pharmacy benefit managers in exchange for preferential treatment of Horizon's drugs Tepezza, a treatment for thyroid eye disease, and Krystexxa, a treatment for chronic refractory gout. [43]

Prior to the litigation, Amgen had offered to commit to conduct remedies, including a prohibition on bundling the product, but the FTC rejected the proposal. The FTC argued that Amgen could offer "cross-market bundle" rebates that would make it nearly impossible for smaller rivals — or any entity without blockbuster drugs — to compete against the two drugs. [44] On September 1, 2023, however, the FTC entered into a proposed order that prohibited Amgen from bundling an Amgen product with either Tepezza or Krystexxa. [45] In addition, Amgen may not condition any product rebate or contract terms related to an Amgen product on the sale or positioning of either one of these drugs.

33 Press Release, FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal, Aug. 31, 2023. https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-secures-settlement-ice-black-knight-resolving-antitrust-concerns-mortgage-technology-deal.

34 *Id.*

35 *Id.*

36 Press Release, FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal, Aug. 31, 2023.

37 *Id.*

38 *Id.*

39 *Id.*

40 Press Release, FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses, FTC (May 16, 2023), https://www.ftc.gov/news-events/news/pressreleases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-usedtreat.

41 *Id.*

42 See *id.*

43 *Id.*

44 *Id.*

45 Press release, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition, FTC (September 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

Amgen also is barred from using any product rebate or contract term to exclude or disadvantage any product that would compete with Tepezza or Krystexxa.[46]

B. DOJ

WMS/Cargill/Sanderson Farms/Wayne Farms: In July 2022, the DOJ filed a civil lawsuit and a proposed consent decree against data consulting firm Webber, Meng, Sahl and Company (WMS) and its President, G. Jonathan Meng, as well as poultry processors Cargill, Cargill Meat Solutions, Sanderson Farms and Wayne Farms, to end an alleged conspiracy to suppress worker pay at poultry processing plants.[47] This action was one of the first antitrust consents based on harm to workers.[48] As Principal Deputy Assistant Attorney General Doha Mekki stated, "[t]hrough a brazen scheme to exchange wage and benefit information, these poultry processors stifled competition and harmed a generation of plant workers who face demanding and sometimes dangerous conditions to earn a living. Today's action puts companies and individuals on notice: the Antitrust Division will use all of its available legal authorities to address anticompetitive conduct that harms consumers, workers, farmers, and other American producers."[49]

In October 2022, the consent decree was finalized which prohibits the defendants from sharing competitively sensitive information about poultry processing plant workers' compensation. In addition, the consent order imposes, among other terms and conditions, a court-appointed compliance monitor who would ensure compliance with all federal antitrust laws, permit the Antitrust Division to inspect the processors' facilities and interview their employees to ensure compliance with the consent decree. Further, Jonathan Meng, WMS's President, is also subject to the terms of the consent decree in his individual capacity.[50] Finally, the companies also agreed to pay $84.8 million in restitution for poultry processing plant workers who allegedly were harmed by the information exchange.[51]

Assa Abloy/Spectrum Brands: Despite its fierce rhetoric the DOJ still enters into consent decrees that preserve competition. In May 2023, the DOJ announced that it had reached a settlement in its litigation to block ASSA ABLOY AB's ("ASSA ABLOY") proposed $4.3 billion acquisition of Spectrum Brand Holding Inc.'s hardware and home improvement division.[52] Under the terms of the settlement, ASSA ABLOY must divest assets " that are designed to allow Fortune to compete in the markets for premium mechanical door hardware and smart locks used in residential and multifamily buildings. These assets include ASSA ABLOY's EMTEK and Schaub premium mechanical door hardware businesses, its Yale and August residential smart lock businesses in the United States and Canada, and other assets for multifamily smart lock applications in the United States and Canada".[53] Notably, the settlement also includes, among other things, a monitor trustee, necessary intellectual property rights, and penalty provisions for not honoring the terms of the settlement.[54]

UnitedHealth/Change Healthcare: In February 2022, the DOJ sought to enjoin the proposed $13 billion merger of UnitedHealth Group and Change Healthcare. The DOJ alleged that UnitedHealth's acquisition would give it access to rival health insurers' data and provide an incentive to slow the delivery of new insurance claim processing tools.[55] Attorney General Merrick B. Garland commented that "If America's largest health insurer is permitted to acquire a major rival for critical health care claims technologies, it will undermine competition for health insurance and stifle innovation in the employer health insurance markets. The Justice Department is committed to challenging anticompetitive mergers,

46 Press release, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition, FTC (September 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

47 Press release, Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers, July 25, 2022. https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 Press Release, Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division, May 5, 2023. https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum.

53 *Id.*

54 *Id.*

55 Press Release, Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare, dated February 24, 2022. https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

particularly those at the intersection of health care and data."[56] In an attempt to respond to the government's competitive concerns, the parties proposed a fix-it-first solution of divesting Change's first-pass claims editing business, ClaimsXten, to a private equity firm. After determining that the proposed remedy failed to maintain competition in the alleged horizontal competitive overlap for health insurance claims editing, the government proceeded to file its injunctions raising both horizontal and vertical concerns.[57] The court, however, forced the DOJ to litigate the fix and accepted the merging parties' proposed solution, holding that "competition in the post-divestiture market for first-pass claims editing will match, and perhaps even exceed, its current levels."[58]

V. CONCLUSION

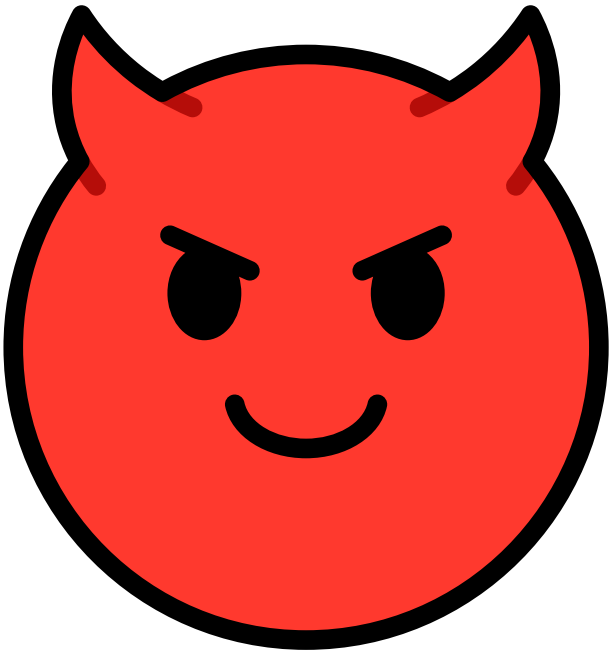
Although the Biden Administration antitrust enforcement agencies have changed policies and aggressively investigated and litigated mergers that raised anticompetitive issues, both agencies continue to consider and enter into consent orders — sometimes by choice and sometimes during challenging litigation with unknown outcomes. In either circumstance, reasonable fix-it-first remedies and entering into consent agreements will continue to offer a good strategy for resolving the agencies' competitive concerns.

56 *Id.*

57 *Id.*

58 *United States v. United Healthcare Group, Inc.*, (D.D.C. Sept. 21, 2022).

THE FTC'S PRIOR APPROVAL MISCHIEF



BY JONATHAN JACOBSON[1]

1 Senior of Counsel, Wilson Sonsini Goodrich & Rosati. Many thanks to Scott Sher for helpful comments. Mr. Jacobson represented Coca-Cola in the Dr Pepper merger case discussed throughout this paper. The views here, including all mistakes, are entirely my own and do not speak for Wilson Sonsini or any of the firm's clients.

It is no secret that the Federal Trade Commission, as currently constituted, dislikes almost all mergers and acquisitions. To that end, it has proposed the most aggressive *Merger Guidelines* in the past 55 years and a revised Hart-Scott-Rodino pre-merger notification form that, if it ever is allowed to go into effect, would require massive expenditures of time and money to complete. This paper is about a related third FTC initiative: the October 2021 *Statement of The Commission on Use of Prior Approval Provisions in Merger Orders*[2] and, in particular, the *Coca-Cola/Dr Pepper* case that provided the sound reasons underlying the 1995 policy that the current Commission majority has now repudiated.

I. CURRENT PRIOR APPROVAL POLICY

In 1995, the FTC adopted a policy that, in merger case settlements, provisions calling for prior FTC approval of future transactions would not be required automatically but instead would be required on a case-by-case basis, primarily where there was some credible risk that the acquiring firm would seek a similar or unreportable merger in the near future.[3] On July 21, 2021, by a 3-2 vote, the Commission repealed this policy[4] and on October 29, 2021, a 2-2 Commission adopted the new policy.[5] The central features of the revised policy can be summarized briefly:

- The FTC will "routinely require merging parties subject to a Commission order to obtain prior approval from the FTC before closing *any* future transaction affecting each relevant market for which a violation was alleged."
- These provisions will be effective for a minimum of ten years.
- The FTC may impose "stronger relief" by imposing prior approval provisions that cover "product and geographic markets beyond just the relevant product and geographic markets affected by the merger."
- *Buyers* of divested assets will have "to agree to a prior approval for any future sale of the assets they acquire in divestiture orders," again "for a minimum of ten years."[6]

The FTC added this comment: "The Commission is less likely to pursue a prior approval provision against merging parties that abandon their transaction prior to certifying substantial compliance with the Second Request (or in the case of a non-HSR reportable deal, with any applicable Civil Investigative Demand or Subpoena *Duces Tecum*)." Under the pre-1995 policy, the FTC would seek prior approval of an abandoned deal only after being required to file a complaint in federal court.

As Commissioners Phillips and Wilson explained, these provisions go well beyond the prior approval policy that was in force before 1995.[7] Standard FTC policy then required prior approval provisions in merger consent orders, but the provisions were limited to deals in the same relevant market, and ten years was a maximum, not a minimum – and would be invoked only after a federal district court complaint was filed. There was also nothing about requiring buyers to submit to any prior approval requirement.

So why was the pre-1995 policy changed? And does the reasoning in 1995 have relevance to the economy today? A visit to the Coke/Dr Pepper saga from the 1980s and 1990s provides some answers.

II. *COCA-COLA/DR PEPPER*

On January 25, 1986, PepsiCo announced that it was acquiring 7-Up. At the time, Coca-Cola management had wanted to acquire Dr Pepper, but the company's terrific in-house competition counsel, Jim Koelemay, had advised that any such acquisition would be challenged by the FTC.

2 https://www.ftc.gov/legal-library/browse/statement-commission-use-prior-approval-provisions-merger-orders.

3 https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

4 See Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf.

5 At the time the new policy was adopted, former FTC Commissioner Chopra had already moved to become the Director of the Consumer Financial Protection Bureau but was said to have cast his vote before leaving. Commissioners Phillips and Wilson dissented, in the course of which they dubbed this a "zombie" vote. Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), at https://bit.ly/3QYggCD.

6 https://www.ftc.gov/legal-library/browse/statement-commission-use-prior-approval-provisions-merger-orders.

7 Dissenting Statement of Commissioners Wilson and Phillips, *supra* note 4.

So when Pepsi's announcement was made, Coke's senior management asked whether Pepsi just had better lawyers (!) and (more seriously) determined that, if Pepsi could do it, so would Coke. On February 21, 1986, Coca-Cola announced that it would buy Dr Pepper.

The two announcements made a big splash. Royal Crown sought a preliminary injunction against both deals in a Georgia district court, but the motion was quickly denied as there could be no irreparable harm from a transaction at the beginning of FTC review. The parties sought to persuade the Commission that deals would increase market output and benefit consumers, but the FTC was having none of it and voted in June 1986 to challenge both transactions. Pepsi, true to form, abandoned its proposed merger before any complaint could be filed.[8] Coke did not.

The Commission voted out a complaint on June 24, 1986, and the parties proceeded to trial in the District of Columbia in delightful July DC weather before Judge Gerhart Gesell. Judge Gesell was the legendary advocate who, among many other accomplishments in private practice, won the *duPont/Cellophane* case in the Supreme Court. But he was no shill for defendants in antitrust cases, with his basic 1960s antitrust outlook. As we would soon learn.

Trial. Trial lasted two weeks. My job was to prepare our economists (Will Baumol and Bill Lynk) and depose the FTC's (Larry White). The legendary Gordon Spivack argued the case and handled the witnesses at trial. The evidence was essentially undisputed that the acquisition would increase the share of the leading firm in carbonated soft drinks, which was found to be the relevant market and highly concentrated. But it was also undisputed that Coke lacked single-firm market power in any geographic market, that there were significant efficiencies as Dr Pepper was predominantly sold by Coke bottlers, and that the acquisition would increase market output. Judge Gesell was unfazed. On July 31, he issued an opinion enjoining the merger.[9]

Appeal. Coca-Cola quickly appealed. But just as I finished our appeal brief, Dr Pepper pulled the plug on the deal[10] and soon afterwards was sold to the Hicks & Haas investment firm. (Dr Pepper is now part of the Keurig/Dr Pepper-7-Up/Snapple group.) The case had become moot as a result of the sale, and we revised our appeal to argue that Judge Gesell's ruling should be vacated as a result. FTC staff opposed our motion, but the Court of Appeals agreed and vacated the ruling.[11] The D.C. Circuit panel on the case included Robert Bork and Douglas Ginsburg. We were left to wonder what the outcome of a merits appeal would have been.

Administrative proceedings. Back at the FTC under Part III, the case was still moot and Coca-Cola argued that further proceedings would "not be in the public interest" (the FTC standard whether to pursue a case) as a result. Ultimately, Complaint Counsel and the ALJ agreed and recommended dismissal of the case. But the Commission, by a 2-1 vote (Chairman Oliver dissenting), found otherwise, saying: "We are not persuaded that subsequent events have eliminated the need for some form of prior approval relief if a violation of law is established. Notwithstanding Respondent's arguments to the contrary, continuation of this proceeding is therefore in the public interest."[12] So the case was sent back to determine whether the acquisition in fact was unlawful and, if so, to enter a 10-year prior approval order for any proposed acquisition in the carbonated soft drink industry.

Most companies in this context submit to prior approval orders and settle. That was not an option for Coke. Prior approval would put Coke in a position where, if an asset or company came up for sale, Pepsi could buy it (subject of course to the HSR process), but Coke could not – at least without a long review by FTC staff and the consent of a then-hostile FTC. The owners of the asset would obviously prefer Pepsi in that context, and Coca-Cola would be at a serious disadvantage in this famously competitive business. So a moot case went to trial solely because of the prior approval threat.

The case was tried over several weeks before the ALJ, the first time in memory that a genuinely moot case went to trial – and this one was a major resource commitment from both sides. ALJ Parker ultimately concluded that the merger violated Clayton Act § 7 and FTC Act § 5. He declined, however, to enter a prior approval order, finding it unnecessary and contrary to the public interest.

Both Coke and Complaint Counsel appealed to the full Commission, which unsurprisingly affirmed the merits ruling in a 3-0 vote and ordered a 10-year prior approval requirement. The order provided that, without the Commission's prior approval, Coca-Cola could not acquire

8 In the *Sun-Drop* case in North Carolina, where RC bottlers were suing both Coke and Pepsi bottlers, Pepsi settled two days before trial. In the *Harmar* case in east Texas state court, where again RC bottlers were suing, Pepsi again settled on the eve of trial.

9 *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987).

10 Dr Pepper Halts Plan to Merge with Coca-Cola (Aug. 6, 1986), at https://www.latimes.com/archives/la-xpm-1986-08-06-fi-1607-story.html.

11 *FTC v. Coca-Cola Co.*, 829 F.2d 191, 1987 U.S. App. LEXIS 17849 (D.C. Cir. 1987).

12 *Coca-Cola Co.*, Dkt. 9207, 1988 WL 490206 (FTC Aug. 9, 1988).

anyone "engaged in the manufacture and sale in the United States of branded concentrate or branded syrup . . . or engaged in the franchising or licensing of any brand, name, or trademark used in the United States in connection with the production, marketing, or sale of branded concentrate, branded syrup, or branded carbonated soft drinks."[13] Prior approval was not required for tiny acquisitions; for those there was a prior notice requirement.

Appeal and resolution. Coca-Cola appealed once again to the D.C. Circuit. The arguments on the merits were largely the same, but the disparity between the treatment of Pepsi (who after all started the whole mess) and Coke was an additional point. While the appeal was pending, President Clinton appointed Robert Pitofsky to be the Chairman of the FTC. Pitofsky was firmly committed to aggressive antitrust enforcement. But he disagreed with the Commission's prior approval policy, and so there was room for a settlement.

On May 18, 1995, a little over a month after Pitofsky became FTC Chairman, the case settled. Coke withdrew its appeal and the Commission entered a modified order under which: "Coca-Cola [was] required to notify the FTC and the Department of Justice before acquiring more than $15 million in assets or voting securities from an entity worth more than $10 million," i.e. a prior notice provision. Prior approval was no longer required except that Coke would have to seek prior approval if it sought to acquire Dr Pepper again. A final order to that effect was entered May 25, 1995.[14] The vote was 3-0.

Revised prior approval policy. The Commission explained its reasoning in jettisoning the prior policy:

- *Preventing facially anticompetitive deals*. Too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures. Acquisitive firms in particular are too willing to roll the dice on an anticompetitive deal because there are few downsides (from their perspective) to their long-term strategy that contemplates other acquisitions down the road. . . .

- *Preserving Commission resources*. Challenging anticompetitive mergers—through litigation or settlement—is a resource intensive enterprise that puts pressure on the Commission's limited staff and budget. Where the Commission has expended those resources to understand the competitive dynamics and market structure of a particular market, the Commission should not have to incur additional costs by either (1) re-reviewing the same transaction on numerous occasions or (2) reviewing a similar transaction by one of the merging parties in the same market. . . . Conducting merger review after a petition for prior approval would allow the Commission to husband its scarce resources without the brinksmanship we encounter during HSR reviews.

- *Detecting anticompetitive deals below the HSR reporting thresholds*. Incorporating prior approval provisions in Commission orders reduces the risk that the Commission will not learn of harmful mergers that do not trigger federal antitrust reporting requirements. . . . Absent these provisions, the Commission often learns about these deals without sufficient time to investigate and, if necessary, block the transaction.[15]

Apart from ignoring the significant burden that prior approval can put on companies, and the competitive disadvantage it can place on firms (such as Coca-Cola faced), these explanations just do not hold up. Transactions under HSR thresholds is the strongest argument, but a prior *notice* requirement would alleviate any such concern; even without prior notice, most transactions worth pursuing will be announced publicly and, if the deal really is problematic, affected parties can complain. The "prevent facially anticompetitive deals" excuse is even worse. If the Commission is doing its job, it will block such transactions through the normal HSR process. And "preserving Commission resources" has it backwards. Prior approval requires the Commission to investigate *every* proposed transaction, not just those that pose some competitive risk. That can require more resources, not less, than relying on the normal HSR process.

The dissenting statement from then-Commissioners Phillips and Wilson identified a number of other problems with the policy change. Significantly, as they explained, FTC review of transactions under prior approval petitions takes much much longer than HSR reviews for the simple reason that there is a statutory clock on HSR deals but not for prior approval petitions. The divestiture buyer remedy is especially problematic in this context. When assets are being sold off, either because of FTC litigation or otherwise, buyers subject to a prior approval remedy will be at a major disadvantage because of the lengthy time it will take to gain prior approval. Divestitures are almost always difficult. But this requirement will make them even more so by chasing potential buyers away. Buyers in bankruptcy subject to prior approval will be left out almost entirely

13 *Coca-Cola Co.*, 117 F.T.C. 795, 1994 WL 16011006 (June 13, 1994).

14 *Coca-Cola Co.*, 119 F.T.C. 724 (1995).

15 Statement of the Commission, *supra* note 1.

because the bankruptcy timeline is necessarily short and the prior approval process necessarily long. Sellers in bankruptcy will be disadvantaged because a sale cannot be approved until the FTC has weighed in.

Further, as the dissenters explained:

> [T]he majority seems to relish the prospect of controlling the clock, stating that "[c]onducting merger review after a petition for prior approval would allow the Commission to husband its scarce resources without the brinksmanship we encounter during HSR reviews." Particularly given the torrent of prior approval deal notifications the agency will receive once this policy is up and running, we anticipate lengthy delays in deal review. A lengthy investigation can be a death knell for many deals as financing runs out, suppliers and customers hesitate to do business with the merging parties whose futures remain uncertain, and the parties hemorrhage employees in the face of uncertainty. For the majority, though, this is a feature, not a bug.[16]

III. CONCLUSION

Mergers and acquisitions can harm competition. That is one of the major reasons why we have the Sherman, Clayton, and FTC Acts to begin with. And some deals are really bad (whether they harm competition or not). AOL/Time Warner is an example. But they can also provide huge benefits to the economy. Take Google's 2006 acquisition of YouTube, where YouTube was on a path to go out of business had Google not acquired it and then enhanced its offering with better monetization and many improved, consumer-friendly features. Presumably, even the FTC would agree that the combination of Keurig, Dr Pepper, 7-Up, and Snapple was procompetitive as well. There are too many others to mention. By acquiring firms that allow for the creation of a new product, provide enhanced features for existing products, or that sharply reduce costs, mergers can allow competition and innovation to thrive. Putting roadblocks in the way of virtually every merger can only harm the economy.

16 Dissenting Statement of Commissioners Wilson and Phillips, *supra* note 4.

FIX-IT-FIRST: A SEISMIC SHIFT IN U.S. ANTITRUST AGENCY APPROACHES TO MERGER REMEDIES

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I. INTRODUCTION

Until recently, the U.S. antitrust agencies commonly resolved concerns regarding proposed mergers by entering a consent decree with the merging parties that included remedies. The merging parties might sell off overlapping assets or make behavioral commitments to address agency concerns, but the transaction would be allowed to proceed. Senior officials at the U.S. Department of Justice Antitrust Division ("DOJ") and the U.S. Federal Trade Commission ("FTC"), however, have now made clear that their agencies will no longer entertain or will sharply limit resolutions through consent decrees with remedies, preferring to challenge transactions outright. The agencies' new positions on remedies have dramatically changed the U.S. merger review landscape for transactions that potentially raise antitrust concerns, leading parties to such transactions increasingly to contemplate "fix-it-first" strategies. With fix-it-first, the parties modify the transaction to address antitrust concerns, typically by entering an agreement with a third party to sell divested assets, without entering a consent decree with the agency. The agency can then either clear the transaction based on the proffered remedy or litigate over the remedy's adequacy and sometimes over whether the transaction may lessen competition in the first place.

II. BACKGROUND

The U.S. antitrust agencies' antagonism toward negotiated remedies in merger cases is a new phenomenon. Prior agency regimes scrutinized remedy proposals extremely closely to satisfy themselves that the remedy — e.g. the scope of the asset package and proposed buyer for a divestiture — would fully replicate the intensity of pre-transaction competition. The agency remedy review process often led to significant changes in the proposed remedy as a condition to clearing the transaction with a consent decree. Nevertheless, a large proportion of those transactions that the agencies concluded otherwise would violate the antitrust laws were cleared through a negotiated remedy embodied in a consent decree.

The U.S. antitrust agencies now have very different postures on merger remedies. In a January 2022 speech, Assistant Attorney General for DOJ's Antitrust Division Jonathan Kanter said that he was "concerned that merger remedies short of blocking a transaction too often miss the mark."[2] Kanter went on to say that "in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction."[3] Since Kanter's speech nearly two years ago, DOJ has agreed to resolve a merger case through a consent decree only once.[4] And that was during litigation after the court had shown a willingness to consider the parties' fix-it-first remedy.[5] DOJ is currently litigating over the sufficiency of proposed fix-it-first remedies after rejecting JetBlue and Spirit's proposal to resolve antitrust concerns regarding their proposed merger by divesting assets at certain airports.[6]

FTC leaders have voiced similar views. In a June 2022 interview, FTC Chair Lina Khan said that the pattern of negotiating with merging parties to "fix" their transactions is "not work the agency should have to do. That's something that really should be fixed on the front end by parties being on clear notice about what are lawful and unlawful deals."[7] Khan added, "We're going to be focusing our resources on litigating, rather than on settling."[8] In February 2023, former FTC Bureau of Competition Director Holly Vedova said that the FTC was moving "away from . . . remedies with 'numerous, complicated, and long-standing entanglements.'"[9] Vedova stated that "[b]ased on our own experience and study . . . [t]he Bureau of Competition will only recommend acceptance of divestitures that allow the buyer to operate the divested business on a

2 Jonathan Kanter, Assistant Att'y Gen., US Dep't of Justice, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section, (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

3 *Id.*

4 See Press Release, US Dep't of Justice, Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division (May 5, 2023), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum.

5 Bryan Koenig, *Assa Abloy Judge Questions "Unreal World," Review Gaming, Law*360 (Mar. 14, 2023), https://www.law360.com/articles/1585871.

6 Plaintiffs' Pretrial Brief at 28-29, *United States v. JetBlue Airways Corp.*, No. 1:23-cv-10511-WGY (D. Mass. Oct. 30, 2023).

7 Margaret Harding McGill, *FTC's new stance: Litigate, don't negotiate*, Axios (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

8 *Id.*

9 Holly Vedova, Bureau of Competition Director, Fed. Trade Comm'n, Update from the FTC's Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

standalone basis quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner."[10] She said the Bureau of Competition "will no longer consider remedies where there is a heightened risk of failure. These include proposals of less than standalone business units, or where there are forward-looking entanglements between the buyer and seller, such as supply agreements, or where there is no strong independent buyer."[11]

The FTC has in practice been far less absolutist than DOJ: it has approved ten consent decrees with remedies to resolve merger cases since the beginning of 2022. Nevertheless, it is clearly articulating a more restrictive approach than past FTC regimes toward resolving merger cases through consent decrees. For instance, many merger cases have traditionally been resolved through divestitures of less than a standalone business. In the FTC's March 2023 complaint challenging Intercontinental Exchange, Inc.'s proposed acquisition of Black Knight, however, the FTC alleged that the merging parties' proposed divestiture did not fix the acquisition's anticompetitive effects because, among other things, the remedy failed "to transfer a standalone business" to the proposed divestiture buyer.[12] The FTC ultimately agreed to settle the case after the parties agreed to a broader remedy that included Black Knight's Optimal Blue and Empower businesses.[13]

In practice, if the FTC will not clear transactions with a consent decree based on a divestiture of less than a standalone business, there will be many circumstances in which the parties cannot practicably negotiate a consent decree, which likely will increase the number of FTC-reviewed transactions for which the parties will need to consider a fix-it-first remedy. In September 2023, the FTC did accept a consent decree during preliminary injunction litigation to resolve its attempt to block Amgen Inc.'s ("Amgen") proposed acquisition of Horizon Therapeutics plc. ("Horizon") based on conglomerate concerns. The remedy prohibits Amgen from bundling its drugs with certain legacy Horizon drugs or offering certain types of contract terms or rebates.[14] Given that *Amgen/Horizon* involved an unusual theory of competitive harm, however, it is unclear whether the FTC will deviate from its announced policy of requiring divestitures of a standalone business in more mainstream cases.

III. IMPLICATIONS OF THE NEW REMEDY POLICIES

The antitrust agencies' new approaches to remedies have important real-world implications for merging parties. Among other things, parties are increasingly contemplating fix-it-first strategies. Those can involve divesting assets to an identified buyer with a negotiated transaction agreement during the agency's review but could also involve consummating a transaction to address potential antitrust objections before submitting a Hart-Scott-Rodino notification. For example, Quikrete and Forterra entered a merger agreement in February 2021,[15] and after receiving a DOJ second request, Forterra entered a series of divestiture agreements with third parties in late 2021 and early 2022 "[i]n order to address some of the divestitures anticipated to be required by the DOJ[.]"[16] A year after signing their merger agreement, Quikrete and Forterra closed the transaction without a consent decree,[17] and DOJ has not challenged the transaction to date.[18] In November 2022, Columbia Banking System, Inc. announced that it agreed to divest ten of its bank branches in California, Washington, and Oregon "to satisfy commitments to DOJ in connection

10 *Id.*

11 *Id.*

12 Complaint, In the Matter of Intercontinental Exchange, Inc., FTC Docket No. 9413, https://www.ftc.gov/system/files/ftc_gov/pdf/d09413icebkp3complaintredacted.pdf.

13 *Id.*; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Resolving Antitrust Concerns Surrounding ICE, Black Knight Deal (Nov. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-approves-final-order-resolving-antitrust-concerns-surrounding-ice-black-knight-deal.

14 Press Release, Fed. Trade Comm'n, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

15 Forterra SEC 8-K Filing (Feb. 19, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000119312521049979/d136987d8k.htm.

16 Forterra SEC 8-K Filing (Nov. 24, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000078/frta-20211124.htm; Forterra SEC 8-K Filing (Dec. 13, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846321000082/frta-20211213.htm; Forterra SEC 8-K Filing (Feb. 16, 2022), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001678463/000167846322000013/frta-20220216.htm.

17 Austin Peay & Jenna Ebersole, *Quickrete-Forterra deal received US DOJ sign-off with divestitures without formal settlement*, MLEX (Mar. 30, 2022), https://content.mlex.com/#/content/1368296; Press Release, Quickrete Completes Acquisition of Forterra, Inc., GLOBENEWSWIRE (Mar. 18, 2022), https://www.globenewswire.com/news-release/2022/03/18/2406267/0/en/Quikrete-Completes-Acquisition-of-Forterra-Inc.html.

18 At a conference in March, a DOJ official said that allegations of "some kind of shadow consent decree approval process" were "categorically false." Bryan Koenig, *DOJ Merger Enforcer Denies 'Shadow' Settlements, LAW* 360 (Mar. 29, 2023), https://www.law360.com/competition/articles/1591383?nl_pk=df3b1b8f-689a-47e5-bd50-1e4207a95f49&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-03-30&nlsidx=0&nlaidx=0.

with Columbia Banking System's pending merger with Umpqua."[19] The parties closed their transaction in February of 2023 after entering into a "Letter of Agreement" — rather than a formal consent decree — with DOJ.[20] Perhaps tellingly, DOJ did not publicize this resolution.

Data from 2022 — the first full year the current agency leadership was in place — suggest that the agencies' new positions on remedies are changing how merger reviews of controversial transactions are resolved in practice. On the one hand, DOJ and the FTC, combined, sued to block 10 mergers in 2022 (*more* than in any year since at least 2011). But on the other hand, only 20 transactions (*fewer* than in any year since 2018) led to agency litigation, a consent decree, or a reported abandonment. This is too small a sample size from which to draw definitive conclusions, but the data appear to indicate that, as one would expect, the agencies are litigating more merger cases because they are less willing to resolve antitrust concerns through consent decrees. At the same time, however, fewer transactions are resulting in agency action or abandonment because with the agencies unwilling or reluctant to enter consent decrees, they seem to be allowing more deals to proceed unchallenged in consideration of a fix-it-first remedy or by determining not to take any action regarding transactions that might have resulted in consent decrees in the past.

Finally, there are preliminary suggestions that where the parties have agreed to a credible fix-it-first remedy in an appropriate way, courts will be receptive to denying an injunction based on the remedy. There are indications, however, that courts are likely to insist on two things to deny a preliminary injunction based on a fix-it-first remedy proffer. **First**, they will require that the remedy scope (e.g. the package of assets to be divested and the proposed asset buyer) likely will replicate pre-merger competition or at least come close. For instance, the parties in *United/Change* successfully convinced the court that United's proposed divestiture of Change's ClaimsXten to TPG would replace pre-merger competition in the market for first-pass claims editing software, which health insurers use to determine whether a claims should be paid.[21] Relying on testimony from a TPG executive, the court determined that TPG had "the experience necessary to compete effectively" and "the scope of the divestiture [was] sufficient to preserve competition."[22] **Second**, a court will require that the merging parties have given the agency sufficient opportunity to investigate the proposed remedy — either during the merger investigation or sufficiently early in the litigation process — so that the agency has the evidence it needs to litigate over the adequacy of the remedy if it chooses to do so. Indeed, during the litigation of DOJ's challenge to the proposed merger of ASSA ABLOY and Spectrum Brands, the court asked the parties why they had waited until shortly before litigation to propose their remedy to DOJ, observing, "[w]e don't want to incentivize companies to basically wait on the divestiture."[23] As mentioned, however, DOJ ultimately entered a consent decree to resolve that challenge. In *FTC v. Ardagh*, the district court refused to hear evidence of a proposed divestiture offered after the close of fact discovery in part because the merging parties had not given the FTC sufficient time to evaluate it.[24]

IV. POTENTIAL SOLUTIONS AND CHALLENGES FOR MERGING PARTIES

The agencies' apparent unwillingness, or at least great reluctance, to rely on traditional merger remedies introduces new variables into pre-transaction planning and antitrust review strategy for parties facing transactions that may raise competition concerns in the United States. (Non-U.S.

19 Press Release, Columbia Banking System, Columbia Banking System Announces Agreement to Sell Three Branches in Northern California to First Northern Bank (Nov. 11, 2022), https://www.columbiabankingsystem.com/news-market-data/press-releases/press-release/2022/COLUMBIA-BANKING-SYSTEM-ANNOUNCES-AGREEMENT-TO-SELL-THREE-BRANCHES-IN-NORTHERN-CALIFORNIA-TO-FIRST-NORTHERN-BANK/default.aspx; Press Release, Columbia Banking System, Columbia Banking System Announces Agreement to Sell Seven Washington and Oregon Branches to 1st Security Bank (Nov. 7, 2022), https://www.columbiabankingsystem.com/news-market-data/press-releases/press-release/2022/COLUMBIA-BANKING-SYSTEM-ANNOUNCES-AGREEMENT-TO-SELL-SEVEN-WASHINGTON-AND-OREGON-BRANCHES-TO-1ST-SECURITY-BANK/default.aspx.

20 Columbia Banking System, Inc., SEC 8-K Filing (Feb. 28, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/887343/000119312523056342/d413616d8k.htm; Umpqua Bank, Summary of DOJ's Letter of Agreement with Umpqua and Columbia, https://www.umpquabank.com/globalassets/media/documents/regulatory-update.pdf.

21 *United States v. UnitedHealth Group*, No. 1:22-cv-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 19, 2022).

22 *Id.* at *11, 13.

23 Bryan Koenig, "Assa Abloy Judge Questions 'Unreal World,' Review Gaming," Law360 (Mar. 14, 2023), https://www.law360.com/competition/articles/1585871?nl_pk=99a13b08-0a7e-4b99-81ea-cbebced10614&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-03-15&nlsidx=0&nlaidx=3.

24 See Pre-Hearing Conference Transcript, *FTC v. Ardagh*, No. 13-1021 (D.D.C. 2013) at Tr. 13:19-25, 29:10-15 ("Let me tell you right now, I do not believe that that can be thoroughly investigated in three weeks between now and my hearing. I just don't see it. I just don't think the negotiations are far enough along the line, and I don't think it's fair to the other side to ask them to do that."); see also *Chemetron Corp. v. Crane Co.*, No. 77 C 2800, 1977 WL 1491, at *7 (N.D. Ill. Sept. 8, 1977) (refusing to consider evidence of a remedy proposal submitted during a preliminary injunction hearing).

antitrust authorities appear to be continuing their traditional practices of evaluating proposed remedies and clearing transactions subject to remedial undertakings if they find the remedy adequate.) Where there is a remedy that is workable as a business matter and consistent with deal objectives, a fix-it-first remedy can be the keystone for a successful approach. Further, a well-considered fix-it-first strategy can bring several potential benefits and even result in a more favorable outcome than under the traditional approach of negotiating a consent decree with the agency. These benefits include: (i) decreasing the likelihood of prolonged antitrust litigation (on the possibility that the agency may decline to litigate the adequacy of the remedy), thereby shortening the transaction timeline; (ii) providing upfront certainty regarding the scope of the divestiture and avoiding the traditional agency remedy review process, which sometimes can lead to a demand for a broader remedy; (iii) avoiding the compliance burdens of an agency consent decree — for example, being subject to enter into an FTC "prior approval" provision, requiring the merging parties to seek approval from the agency before making future acquisitions in at least the market where the FTC alleges harm to competition, which the FTC is now requiring in all merger consent decrees; and (iv) in some cases, particularly where the fix-it-first divestiture sale process occurs before the primary transaction is announced or relatively early in the agency review process, avoiding a fire sale at depressed prices at the end of the merger review process.

Notwithstanding these potential benefits, a fix-it-first strategy can be difficult to execute. Accordingly, parties contemplating a merger that may raise antitrust concerns should closely examine the need for and the potential advantages and disadvantages of pursuing a fix-it-first strategy at the earliest stages of deal consideration. Among other things, parties should carefully assess the significance of the assets that may have to be divested to the deal objective and practical challenges for a potential divestiture or other remedy, including whether it is feasible to extract selected assets from the rest of a merging party's business that enable a divestiture to compete effectively without unduly impairing retained assets, and whether there are capable potential buyers who will be interested in the divested assets. The parties should also consider the potential timelines for completing the transaction with and without a fix-it-first remedy and the consequences to, and rights and remedies of, the parties if the transaction is blocked, notwithstanding a fix-it-first strategy.

If the parties decide to employ a fix-it-first strategy, timing considerations will be critical. There may well be difficult decisions to make regarding the balance between seeking to persuade the agency — or ultimately a court — that the transaction will not harm competition at all or in a particular market and beginning the sales process to reach agreement with a divestiture buyer — which can take several months — to minimize closing delays or the risk of going past the transaction's end date. The buyer may have incentives to try to minimize the scope of the divestiture, while the seller likely will be focused on maximizing deal certainty and expediting closing. Whether one is the buyer or the seller, it is crucial to give careful attention to these potential tensions in negotiating deal terms such as regulatory efforts clauses, remedy commitments, the end date, and reverse termination fees. The merging parties should ensure that the regulatory provisions in the applicable transaction documents faithfully reflect the parties' understanding of these critical topics.

“SHADOW” SETTLEMENTS AND THE TUNNEY ACT

BY MICHAEL MURRAY[1]

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The U.S. DOJ Antitrust Division recently has received criticism that its consent decree practices amount to engaging in "shadow" merger settlements. The basic thrust of the criticism is that the Antitrust Division is negotiating merger remedies, including divestitures, without making those settlements public or following the Tunney Act process for consent decrees.

This criticism is related to, but different than, the criticism that the DOJ is reluctant to entertain behavioral or structural remedies. The former criticism is that DOJ is settling cases without publicizing the settlement and its reasoning; the latter criticism is that DOJ is refusing to settle cases.

The DOJ's defense against these criticisms is, similarly, related but different. To defend its reluctance to entertain behavioral or structural remedies, the DOJ conveyed skepticism about merger remedies. To defend against the criticism of "shadow" settlements, it issued a flat denial and professed adherence to the values of the Tunney Act with respect to reasoned and public decision-making assessed in court.

But this invocation of the Tunney Act raises additional questions. It appears to rest on the premise that the Tunney Act properly publicizes and requires judicial assessment of the substantive reasoning behind the Antitrust Division's decisionmaking regarding challenging or settling (or not challenging or settling) merger matters. That premise is deeply flawed. It is constitutionally problematic for a court to review the substantive calculus of Executive Branch officials in investigating and settling a case.

I. CRITICISM OF SHADOW SETTLEMENTS AND DOJ RESPONSE

Criticism of the Antitrust Division's "shadow" settlements spilled out into the open in the past year. It started when astute members of the antitrust press reported that "Quikrete and Forterra closed their deal with divestitures sought by the US Department of Justice without a formalized consent agreement."[2]

Then-FTC Commissioner Phillips around the same time remarked on what he saw as a similar trend from his (slightly different) FTC perspective. He stated hewas "very concerned that we are going to start seeing deals with divestitures but without consents [i.e. consent decrees], that "[t]his is fixing it first with a wink and a nod and no enforceable agreement with the government," and that this practice undermines prior approval requirements.[3]

A few months later, in September 2022, coverage of a similar divestiture involving the DOJ Antitrust Division emerged. The press reported that "[a] pair of West Coast banks have announced that they inked a deal with the U.S. Department of Justice, paving the way to combining their collective $50 billion in assets provided they sell 10 branches."[4] The article noted that "DOJ has not yet made a statement about the agreement."[5]

The Antitrust Division decided to address these criticisms head on at the ABA Spring Meeting. Deputy Assistant Attorney General Andrew Forman told attendees that the claim that the Division is negotiating consent decrees in the "shadows" is "categorically false."[6] Deputy Assistant Attorney General Maggie Goodlander added that negotiating consent agreements outside the scope of the Tunney Act would be inconsistent with fundamental values, including those embodied in the Tunney Act's requirement of reasoned decision-making and transparency. "[W]e honor that," she said.[7]

These statements do not technically address or respond to the practices that prompted the criticisms. There was no charge that the Division is privately negotiating consent decrees, as opposed to settlements or potential divestitures. Indeed, these responses, perhaps unintentionally, elide that distinction.

2 Austin Peay & Jenna Ebserole, Quikrete-Forterra deal received US DOJ sign-off with divestitures without formal settlement, MLex (Mar. 30, 2022).

3 Jenna Ebersole, US FTC's Phillips says agencies are apparently 'fixing it first with a wink and a nod' in deals, MLex (Apr. 27, 2022).

4 Bryan Koenig, DOJ Quietly OKs West Coast Bank Merger, With Branch Sales, Law360 (Sept. 21, 2022).

5 *Id.*

6 Flavia Fortes, Claim that US DOJ does consent decrees in the shadows is 'categorically false,' senior official says, MLex (Mar. 29, 2023).

7 *Id.*

Yet they are attempting to respond to the criticism. In so doing, by invoking the Tunney Act, they hit upon a more fundamental issue: whether the Tunney Act properly publicizes and requires judicial assessment of the substantive reasoning behind the Antitrust Division's decisionmaking regarding challenging or settling (or not challenging or settling) merger matters. Before analyzing that question, it is important first to set forth background principles of transparency in the U.S. antitrust regime.

II. TRANSPARENCY IN ANTITRUST

The U.S. antitrust regime is marked by significant and laudable transparency. That transparency comes from a variety of sources. The Division's historical openness to display its substantive policies — through merger guidelines, remedies manuals, leniency processes, and other remarkably open book policies — is one source. This tradition places the Antitrust Division at one end of a spectrum of openness among DOJ components. It is widely viewed that this transparency is important to economic growth, in that it inculcates predictability that allows businesses to plan transactions, conduct, and other activity.

This transparency, however, is self-imposed. And, as a result, it is inconsistent. There are aspects of the Division's operations that are of course not open to review through the publication of guidelines, manuals, and processes. For example, international cooperation policy and practices, which are the subject of much criticism by the U.S. Chamber of Commerce[8] and even the parties in certain mergers,[9] are generally not discussed publicly. And, although these policies and operations may be criticized, there is not a wellspring of support for opening them to public review.

In addition, and more fundamentally, this transparency generally does not extend from the policymaking space to individual enforcement decisions. The Division generally does not, for example, explain its decisions not to issue a second request. Indeed, apart from occasional closing statements, which tend to be cryptic and terse, the Division does not explain its rationale for closing investigations. And, of course, on the criminal side, the Division's explanations are even rarer.

III. THE TUNNEY ACT

As the front office comments described above indicate, the Tunney Act is another source of transparency. The Tunney Act is not a self-imposed constraint, but rather is imposed by Congress and the courts.

The Tunney Act imposes, as relevant here, two sets of restrictions. First, and in legitimate response to President Nixon's administration's decision to settle a merger case after the RNC received a large donation, the Tunney Act requires the disclosure of lobbying contacts and related items.[10]

Second, and the subject of this article, the Tunney Act requires district courts to determine, after public comment, whether a consent judgment and decree submitted by the Division is in "the public interest." To evaluate the "public interest," courts are to take into account the "competitive impact of such judgment" and "the impact of entry of such judgment . . . upon the public generally . . . including consideration of the public benefit . . . to be derived from a determination of the issues at trial."[11] Congress reaffirmed — indeed, doubled down on — that provision in 2004 in ACPERA, emphasizing that courts "shall" consider these factors.[12]

This provision is rarely litigated in detail. Indeed, the live hearing in the relatively recent CVS-Aetna merger was the first and only in recent memory. But this provision often has been taken to empower courts to review the Division's exercise of prosecutorial discretion, as opposed to the procedures that the Division followed in exercising that discretion. Courts routinely state, for example, that they will not "rubber stamp" the Division's settlements embodied in proposed consent decrees.

8 Diane Bartz, U.S. Chamber of Commerce Sues FTC, Demanding Access to Records, Reuters (July 14, 2022).

9 The United States' Reply On Its Vacatur Motion, Dkt. No. 20, at 4, U.S. v. Sabre Corp., No. 20-1767 (May 29, 2020) ("Appellees' baseless accusations that the United States somehow improperly coordinated with the CMA are false and nonsensical.").

10 15 U.S.C. § 16(g).

11 15 U.S.C. § 16(b)-(e).

12 See Pub. L. No. 108-237 (2004).

IV. CRITICISM OF PART OF THE TUNNEY ACT

To the extent that the Tunney Act provides to courts the authority to review the Division's exercise of prosecutorial discretion, it presents severe constitutional problems under fairly uncontroversial constitutional law principles.

At the outset, one should clearly distinguish against between the procedural and substantive aspects of the Tunney Act. The concerns that led to the Tunney Act — President Nixon's administration settled a merger case after the RNC received a large donation — are legitimate. Courts engage in such procedural review routinely. For example, and most recently, the Second Circuit accepted courts' authority to assess whether consent decrees are "procedurally proper."[13]

The substantive review provisions are, however, different. The basic problem with the substantive review provisions is that it is highly problematic for a court to review the calculus of Executive Branch officials in investigating and settling a case, which inevitably involves the political (not partisan) weighing of potential imperfections in a negotiated remedy with resource allocation decisions. As the Supreme Court put it recently, "[t]he exercise of prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and public policy . . ."[14] The Tunney Act intrudes on this Executive Branch function.

The Supreme Court recognized this concern could arise in judicial second-guessing of consent decrees even before the Tunney Act. It wrote, in an antitrust case pre-dating the Tunney Act, that "sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government so acting."[15]

Three justices wrote similarly in *Maryland v. United States* after the Tunney Act's enactment: "[t]he question assigned to the district courts by the [Tunney] Act is a classic example of a question committed to the Executive."[16] That is because whether and how to settle a case are the prototypical features of prosecutorial discretion. As the D.C. Circuit put it, "[n]ecessarily included within the prosecutorial power is the discretion to withdraw or settle . . ."[17]

Such decisions also are not easily judged by courts. As the three justices explained in *Maryland v. United States*, "[t]here is no standard by which the benefits to the public from a 'better' settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources for other cases."[18]

This concern for the separation of powers is hardly a controversial position, although it is often forgotten: the Department of Justice in administrations of both political parties has expressed these constitutional concerns over the Tunney Act since before its enactment, as have numerous scholars.[19] The Assistant Attorney General for Antitrust testified in 1973 that the Tunney Act "would be inconsistent with both the constitutional nature of the judicial power and the traditional concepts of the adversary process."[20] The FTC Chair said the same: "I doubt that the Court would or should be deemed to have competence in that area which is essentially not a judicial but an executive matter."[21] So, significantly, did members of the bar who served in high-ranking positions in the mid-1960s.[22]

13 *SEC v. Citigroup Global Markets, Inc.*, 752 F. 3d 285, 294 (2d Cir. 2014).

14 *Bond v. United States*, 572 U.S. 844 (2014).

15 *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 689 (1961).

16 460 U.S. 1001, 1005 (1983) (Rehnquist, J., dissenting, joined by Burger, C.J., and White, J.).

17 *Oil, Chem. & Atomic Workers In'tl Union v. OSHA*, 671 F.2d 643, 650 (D.C. Cir. 1982).

18 Maryland, 460 U.S. at 1006.

19 See Lawrence Frankel, Rethinking the Tunney Act, 75 Antitrust L. J. 549 (2008) (collecting sources).

20 The Antitrust Procedures and Penalties Act, 93 Cong. 95 (1973).

21 *Id.*

22 *Id.* (statement of Robert Hammond III).

This skepticism continued after the Tunney Act's enactment. The Office of Legal Counsel — led then by William Barr — concluded that "there are very serious doubts as to the constitutionality" of the Tunney Act because it "intrudes into the executive power and requires the courts to decide upon the public interest – that is, to exercise a policy discretion normally reserved to the political branches."[23]

In the *Microsoft* litigation, significantly, the Division took the same course. There, the district court had understood the Tunney Act as giving it the ability to reject a consent decree on the ground that the court perceived DOJ's complaint to be too narrow. On appeal, the Division contested that reading of the Tunney Act. Its brief argued that "if the Tunney Act were read to permit an inquiry into the government's exercise of prosecutorial discretion, it would raise difficult, and perhaps insurmountable, questions concerning the Act's constitutionality."[24] The court accepted this conclusion, observing that "constitutional difficulties inhere in this statute."[25]

These criticisms have only become more persuasive as they have aged and as the Supreme Court has come to increasingly recognize the importance of the separation of powers. It was Justice Kagan who recently stated that Justice Scalia's dissent in *Morrison v. Olson*, which upheld a restriction on Executive Branch authority, is "one of the greatest dissents ever written and every year it gets better."[26]

V. CONCLUSION

To the extent that the Tunney Act requires the DOJ to publicize and authorizes courts to review substantive decisions to settle or not settle mergers, it raises severe constitutional concerns. Those concerns have animated antitrust enforcers of administrations of both political parties for decades. A proper evaluation of the current criticism of the Division's "shadow" settlements must take into account these constitutional issues that, in the words of the D.C. Circuit, "inhere" in the Tunney Act.

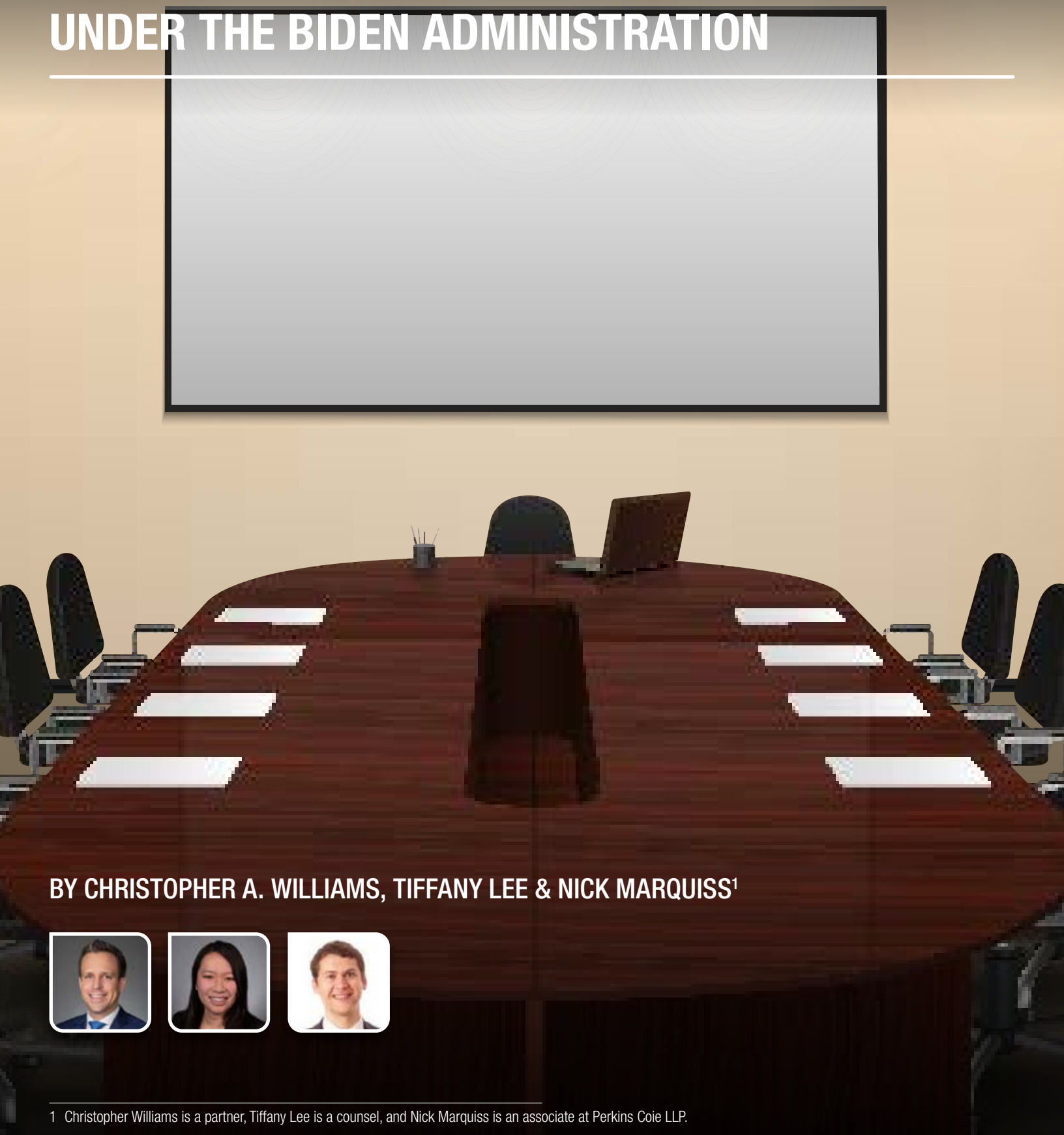
23 William P. Barr, Asst. Att'y Gen., Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 O.L.C. 2017, 219 (1989).

24 *Br. of U.S., U.S. v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995), 1995 WL 17907891.

25 *U.S. v. Microsoft,* 56 F.3d 1448, 1459 (D.C. Cir 1995).

26 Stanford Lawyer (Spring 2015).

ROOM FOR AGREEMENT? ANTITRUST MERGER CONSENT DECREES POLICY AND PRACTICE UNDER THE BIDEN ADMINISTRATION



BY CHRISTOPHER A. WILLIAMS, TIFFANY LEE & NICK MARQUISS[1]

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U.S. antitrust regulators are closely scrutinizing mergers and acquisitions as part of the current administration's tougher stance on antitrust enforcement. This trend comes as no surprise — leadership in both the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") have been outspoken about flexing the full scope of their power to review and challenge anticompetitive mergers, including strengthening their ties with state attorneys general ("AGs"). The agencies have also demonstrated their willingness to block mergers in court, even under novel theories of harm, and do not appear deterred by recent losses in federal court.

Though federal antitrust enforcement agencies appear to have more aggressively challenged mergers in court, they have not entirely abandoned remedying transactions pursuant to consent decrees. This is especially true at the FTC, which has been more willing to enter consent decrees than the DOJ. Moreover, the two agencies have markedly differed in their approach to settling merger challenges. This article explores that difference in depth and offers several theories that may explain it. We also, albeit more briefly, explain how increased ties between federal antitrust enforcers and state AG offices may influence settlement agreements in the future. Finally, we conclude with several practice tips for parties contemplating mergers in this new enforcement environment.

I. BACKGROUND ON MERGER REMEDIES

Historically, the FTC and DOJ have resolved most antitrust enforcement actions by consent decree.[2] From 2001 to 2020, roughly 80 percent of merger challenges[3] were resolved by consent decree in lieu of litigation to block the transaction.[4] Of the litigation challenges, a significant number — approximately 21 percent — were settled post-complaint.[5] These consent decrees consist of structural or behavioral remedies that are intended to maintain or restore competition in the markets affected by the merger.

A structural remedy involves the divestiture or sale of a business or assets to a third party, typically to establish a new, viable competitor in the affected market. This includes (i) the divestiture of an ongoing, stand-alone business (e.g. a subsidiary or business division); (ii) the divestiture of local operating units in mergers involving local geographic markets (e.g. supermarkets, radio stations, and healthcare clinics); and (iii) in some cases, a more limited package of assets to be used by the divestiture buyer as part of a viable, ongoing business that is intended to compete with the merged firm.[6]

A behavioral remedy is a commitment by the merged firm to engage in or refrain from certain business conduct for a period of time, which requires monitoring for compliance during the duration of the consent order. Some examples of behavioral remedies include: (i) information firewalls; (ii) a commitment not to tie or bundle products (e.g. require interoperability with the tying product); (iii) an obligation to supply products or services at a particular price or on a nondiscriminatory basis; (iv) a license of intellectual property rights; and (v) a commitment not to reach exclusive arrangements with suppliers or distributors.

Both agencies have expressed a preference for structural relief — in particular, the divestiture of a stand-alone business — to address horizontal competition concerns.[7] In 2017, the FTC released a study of all 89 consent orders it had issued between 2006 and 2012, finding that its "process for maintaining competition when companies merge is generally effective."[8] The study concluded that all

2 Douglas H. Ginsburg & Joshua D. Wright, Antitrust Settlements: The Culture of Consent, in 1 William E. Kovacic: An Antitrust Tribute 177, 178 (Charbit et al. eds. 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf.

3 A challenge is defined in this paper to include (i) FTC and DOJ settlements filed simultaneously with a complaint (i.e. consents without litigation) and (ii) the FTC and DOJ filing a complaint (either administratively or in federal court) seeking to enjoin a merger, regardless of outcome. The definition of challenge excludes transactions that were abandoned or restructured prior to a complaint being filed. Complete pre-complaint abandonment and restructuring data from October 1, 2021, to the present is not publicly available.

4 Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001–2020*, 85 Antitrust Law Journal 1, 28 (2003) (derived from data in Table 8, which includes both consummated and unconsummated merger challenges and was compiled from the FTC and DOJ dockets, press releases, and Hart-Scott-Rodino Annual Reports).

5 *Id.*

6 The consent decree in the DOJ's challenge to Neenah Enterprises' acquisition of U.S. Foundry is an example of a recent limited assets package. In that settlement, the merging parties were required to divest over 500 gray iron municipal casting patterns to D&L Foundry — another established provider of gray iron municipal castings that had sales primarily outside of the states where the merging parties competed. See Press Release, Department of Justice Antitrust Division, Justice Department Requires Divestitures in Neenah Enterprises Inc.'s Acquisition of US Foundry (Oct. 14, 2021), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-neenah-enterprises-inc-s-acquisition-us-foundry.

7 Press Release, U.S. Department of Justice, Justice Department Issues Modernized Merger Remedies Manual (Sept. 3, 2020), https://www.justice.gov/opa/pr/justice-department-issues-modernized-merger-remedies-manual ("The Merger Remedies Manual emphasizes that structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government regulation of the market."); Richard Feinstein, Federal Trade Commission, *Negotiating Merger Remedies*, 5 (January 2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

8 Press Release, Federal Trade Commission, FTC Releases Staff Study Examining Commission Merger Remedies between 2006 and 2012, https://www.ftc.gov/news-events/news/press-releases/2017/02/ftc-releases-staff-study-examining-commission-merger-remedies-between-2006-2012.

divestitures of an ongoing business were successful.[9] The divestiture of limited asset packages, on the other hand, had only a 60 percent success rate.[10]

Behavioral relief has generally been used to facilitate a divestiture or to remedy vertical concerns.[11] In the 2017 FTC remedy study, all behavioral remedies to vertical mergers were deemed successful. However, Republican administrations have shown more reluctance to accept behavioral remedies to address vertical concerns, largely due to an ideological aversion to "ongoing government regulation" of markets.[12]

It is important to note that not all mergers are remediable, which ultimately means that the government will sue to block such a transaction if the parties do not abandon it prior to litigation. For example, transactions involving the acquisition of a competitor that operates only in one product and geographic market is not remediable by a divestiture.[13]

II. CALLS BY ANTITRUST ENFORCERS FOR A DIFFERENT APPROACH TO MERGER ENFORCEMENT

Current leadership at the DOJ and FTC have called for an end to the "era of lax [antitrust] enforcement," including enforcement of mergers and acquisitions under Section 7 of the Clayton Act.[14] Both FTC Chair Lina Khan, who was sworn in on June 15, 2021, and DOJ Antitrust Division Assistant Attorney General ("AAG") Jonathan Kanter, who was confirmed on November 16, 2021, have expressed ambitious plans for merger enforcement, including an increased willingness to sue to block potentially anticompetitive mergers rather than agree to a risky merger remedy.

In June 2022, Chair Khan stated that the FTC intends to spend its "resources on litigating, rather than on settling,"[15] suggesting that consent orders will be a disfavored solution to merger challenges going forward. In February 2023, the former Director of the FTC's Bureau of Competition, Holly Vedova, explained the agency's current approach of accepting only "divestitures that allow the buyer to operate the divested business on a stand-alone basis quickly, effectively, and independently, and with the same incentives and comparable resources as the original owner."[16] Vedova added that the FTC would "no longer consider remedies where there is heightened risk of failure," such as divestitures of less than a stand-alone business, where there are future entanglements between the divestiture parties, or where the is no strong, independent divestiture buyer.[17] Instead, the agency will sue to block the merger.

In January 2022, AAG Kanter was even more outspoken against merger remedies, stating that "merger remedies short of blocking a transaction too often miss the mark," and adding that "in most situations . . . seek[ing] a simple injunction to block the transaction . . . is the surest way to preserve competition."[18] However, Kanter conceded that there is at least one scenario in which a divestiture may work, that is, when it involves a "sufficiently discrete and complete" business unit in a non-dynamic market.[19]

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9 Federal Trade Commission, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

10 The FTC separately analyzed (i) divestitures of supermarkets, pharmacies, funeral homes and cemeteries, and healthcare clinics, finding a success rate of nearly 91 percent, and (ii) divestitures of pharmaceutical products, finding a success rate of 75 percent.

11 Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (January 2012), 5, https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.

12 U.S. Department of Justice, Antitrust Division, Merger Remedies Manual, 4 (Sept. 3, 2020), https://www.justice.gov/atr/page/file/1312416/download.

13 Additionally, behavioral relief is disfavored as a stand-alone remedy for horizontal mergers, as it would amount to government-imposed price regulation and would not restore competition in the relevant market.

14 Jonathan Kanter, Assistant Attorney General, Assistant Attorney General Jonathan Kanter Delivers Keynote at the University of Chicago Stigler Center (April 21, 2022) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

15 Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, AXIOS (June 8, 2022), https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan.

16 Holly Vedova, Director, Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf.

17 *Id.*

18 Jonathan Kanter, Assistant Attorney General, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

19 *Id.*

AAG Kanter's public statements against merger remedies have only strengthened over time. In September 2023, Kanter highlighted that "the Antitrust Division has been careful not to pursue incomplete or uncertain remedies that ask the public to shoulder the risk of failure" and that the DOJ requires an "appropriate level of confidence that a remedy will be sufficient to address the risk of harm to competition presented by the underlying deal."[20] Despite losing all three district court challenges that were brought since his confirmation, including an appeal of one of those challenges,[21] Kanter boasted that the DOJ's remedy policy is working, noting that the agency is seeing fewer illegal mergers. Of course, this trend is just as likely explained by the slowdown in the economy, which has decreased M&A activity overall.

Where does that leave us? The FTC has expressed a willingness to accept the divestiture of a stand-alone business with no entanglements but will not hesitate to sue to block a merger if the proposed remedy has a material risk of failure. The DOJ, on the other hand, appears to be focused on a litigate-first strategy but remains open to the divestiture of an ongoing business unit under certain market dynamics.

III. MERGER REMEDY OUTCOMES IN KHAN'S FTC AND KANTER'S DOJ

We next analyze whether recent merger enforcement outcomes are consistent with agency rhetoric.[22] We caution against drawing any firm conclusions given that the data available so far assesses only a short period of time; plus, new FTC and DOJ leaders are still establishing their enforcement agendas across their respective agencies. Nevertheless, it is interesting to juxtapose these results, as we do below, with statements from agency leadership detailed in Section II.

Table 1 provides the outcomes of FTC and DOJ challenges initiated on or after June 15, 2021, the date Lina Khan was sworn in as FTC Chair.

Table 1: Outcomes of All Enforcement Actions Initiated on or After June 15, 2021

Description	FTC	DOJ	Total
Consent Decree (Filed Simultaneously with Complaint)[23]	15	6	21
Litigation[24]	11	8	19
Settled Post-Complaint	2	1	3
Abandoned Post-Complaint	5	2	7
Trial Wins	0	1	1
Trial Losses[25]	1	3	4
Outcome Pending[26]	3	1	4
Total Challenges	26	14	40

20 Jonathan Kanter, Assistant Attorney General, Remarks at the 2023 Georgetown Antitrust Law Symposium (Sept. 19, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-2023-georgetown-antitrust.

21 The DOJ successfully challenged Penguin Random House's proposed acquisition of Simon & Schuster on November 2, 2021, two weeks before Kanter's confirmation as assistant attorney general.

22 We compiled data from the FTC's Cases and Proceedings Legal Library (https://www.ftc.gov/legal-library/browse/cases-proceedings), the DOJ's Antitrust Case Filings database (https://www.justice.gov/atr/antitrust-case-filings), FTC and DOJ press releases, and case dockets to prepare the tables in this section. We considered challenges to both consummated and unconsummated mergers and acquisitions.

23 We included the FTC's consent order in QEP Partners/EQT Corporation, even though it did not include an alleged violation of Section 7 of the Clayton Act, because it involves the divestiture of EQT shares held by Quantum.

24 We excluded the DOJ's successful challenge to the alliance between American Airlines and JetBlue, despite it being categorized as a civil merger in the DOJ Antitrust Case database, because the challenge did not involve an acquisition of assets or an entity and only alleged violations of Section 1 of the Sherman Act.

25 The DOJ recently lost the appeal of its lawsuit to block United States Sugar Corporation's acquisition of Imperial Sugar Corporation. The DOJ has not timely appealed its decision to the Supreme Court, so we have categorized this action as a loss.

26 The FTC's challenge to Microsoft's acquisition of Activision Blizzard has been characterized as a pending outcome. While the FTC lost its motion for a preliminary injunction, the matter is under appeal and administrative litigation is pending.

Table 2 provides the outcomes of FTC and DOJ challenges on or after November 16, 2021, the date Jonathan Kanter was confirmed as Assistant Attorney General to the Antitrust Division.

Table 2: Outcomes of All Enforcement Actions Initiated on or After November 16, 2021

Description	FTC	DOJ	Total
Consent Decree (Filed Simultaneously with Complaint)[27]	11	0	11
Litigation	11	6	17
Settled Post-Complaint	2	1	3
Abandoned Post-Complaint	5	1	6
Trial Wins	0	0	0
Trial Losses[28]	1	3	4
Outcome Pending[29]	3	1	4
Total Challenges	22	6	28

Table 3 compares the percentages of challenges that resulted in litigation from 2011 to 2020; from June 15, 2021, to the present; and from November 16, 2021, to the present.

Table 3: Percentages of Litigation Challenges

Time Period	FTC	DOJ	Combined
2001 to 2020	19.5%	21.5%	20.2%
Khan as FTC Chair (June 15, 2021, to Present)	42.3%	57.1%	47.5%
Kanter as AAG (November 16, 2021, to Present)	50.0%	100.0%	60.7%

Notably, Khan's FTC has sued to block transactions at more than double the average rate from 2001 to 2020. Since Kanter joined the Antitrust Division, the DOJ has not agreed to any consent decrees in lieu of litigation. However, in the five months prior to Kanter's confirmation, the DOJ agreed to six merger remedies, two more than the FTC during the same period.

While the lack of consent decrees may only reflect the types of mergers before the DOJ during this period, it does not contradict Kanter's view that suing to block any allegedly problematic merger is a better alternative to a merger remedy. Kanter has stressed that the DOJ is a law enforcement agency and not a regulator, meaning that the courts — and not the DOJ — should determine whether a divestiture will protect competition.[30] He also wants to move the law forward, a goal that cannot be achieved through settlements.[31]

Has the DOJ's litigation-heavy strategy been effective? While there is risk that a divestiture may fail to remedy the anticompetitive concerns that arise from a challenged merger, litigation is not a risk-free proposition either. After bringing a lawsuit, the DOJ could either lose in court outright or win a "Pyrrhic" victory consisting of a proposed fix that may be less effective than what the agencies could have negotiated absent litigation. One wonders whether the DOJ's losses in lawsuits to block UnitedHealth's acquisition of Change Healthcare, Booz Allen Hamilton's acquisition of Everwatch, and United States Sugar's acquisition of Imperial Sugar contributed to its decision to reach a settlement mid-trial in its challenge to Assa Abloy's acquisition of Spectrum Brands.[32] To wit, in its competitive impact statement in the Assa Abloy litigation, the DOJ cautioned that the divestitures, while greater than earlier offers by Assa Abloy, do not "fully eliminate the risk

27 As noted above, we included the FTC's consent order in QEP Partners/EQT Corporation.

28 As noted above, we included the DOJ's lawsuit challenging United States Sugar Corporation's acquisition of Imperial Sugar Corporation as a loss.

29 As noted above, the FTC's challenge to Microsoft's acquisition of Activision Blizzard has been characterized as a pending outcome.

30 Jonathan Kanter, Assistant Attorney General, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

31 *Id.*

32 Press Release, Department of Justice Antitrust Division, Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brand's Hardware and Home Improvement Division (May 5, 2023), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-suit-block-assa-abloy-s-proposed-acquisition-spectrum.

to competition alleged in the Complaint."[33] Nevertheless, the DOJ agreed to settle "[b]ased on the totality of the circumstances and risks associated with this litigation."

While the FTC has pursued remedies more often than litigation during Khan's tenure, the FTC has filed complaints against fifteen mergers with five resulting in the parties abandoning the proposed merger. However, the FTC has faced setbacks in federal court in 2023, losing two motions for preliminary injunctions in cases with nontraditional theories of harm.[34] Since these decisions, the FTC has reached two post-complaint settlements. The first was the FTC's challenge to Intercontinental Exchange's acquisition of Black Knight, which was a horizontal merger challenge that resulted in the divestiture of Black Knight's Optimal Blue and Empower businesses to Constellation Web Solutions.[35] The second was the FTC's challenge to Amgen's acquisition of Horizon Therapeutics, which involved a novel portfolio effects theory of harm and resulted in behavioral relief,[36] a type of remedy former Director Vedova said is "strongly disfavor[ed] . . . because not only are they difficult to enforce, but also because they never seem to work."[37] The behavioral remedy in Amgen is likely an outlier and possibly a face-saving exercise to promote a "win" in a case that was headed to probable dismissal in federal court.

These recent post-complaint settlements do not mean that the FTC and DOJ have backed down on their readiness to litigate in favor of less-sufficient consent decrees. In fact, the agencies filed three merger challenges this year. On March 7, the DOJ sued to block JetBlue's proposed acquisition of Spirit. On July 17, the FTC filed an administrative complaint and preliminary injunction in federal court to block IQVIA's proposed acquisition of Propel Media. And most recently, the FTC filed a lawsuit in federal court on September 21, challenging a roll-up strategy by Welsh Carson and its portfolio company U.S. Anesthesia Partners to purchase nearly every large anesthesiology practice in Texas.

IV. UNDERSTANDING THE DIVERGING REMEDIES PRACTICE BETWEEN THE AGENCIES

Several theories may explain the diverging trends in remedies between the DOJ and the FTC. One theory is based on the nature of the agencies themselves. AAG Kanter is, in general, averse to merger remedies, and the DOJ's mission and culture is that of a law enforcement agency, whereas the FTC's mission and culture is, or is at least akin to, that of a regulatory agency. Together, these factors partly explain why the FTC has continued to resolve remedies pursuant to consent orders under Khan while the DOJ has not under Kanter. However, two other explanations likely contribute to this trend as well.

First, certain types of competitive overlaps and relevant markets have a history of being more successfully remedied by divestiture. Ten of the FTC's fifteen consent decrees under Chair Khan involved transactions where relevant geographic markets were local, and the overlaps in some (not all) of the geographic markets could be remedied by a sale of local operations (e.g. supermarkets and retail gasoline stations). Two of the consent decrees involved pharmaceutical mergers where there was only a subset of overlapping products. The FTC has historically allowed product divestitures in these circumstances. One of the consent decrees involved the divestiture of a consummated minority acquisition, which could be cleanly remedied by a sale of the shares to a third party. One involved the sale of a subsidiary that was a stand-alone business. The last consent decree involved the divestiture of manufacturing plants and was also subject to divestiture remedies by the European Commission. In contrast, the six DOJ challenges under Kanter appear, based on publicly available information, to have involved either competition issues where the entire transaction presented an issue or likely concerns by the DOJ about whether the divestiture was truly a stand-alone business.

Another explanation is the FTC's reinstitution of requiring prior approval orders in connection with its consent orders. Prior to 1995, the FTC required that all companies entering into any agreement that included a divestiture obtain prior approval from the FTC for any future transaction in the same relevant product or geographic market for which a violation was alleged. In 1995, the agency stopped requiring prior

33 Competitive Impact Statement in *United States of America v. ASSA ABLOY AB, et al.* (May 5, 2023), https://www.justice.gov/d9/case-documents/attachments/2023/05/05/413617.pdf.

34 *Fed. Trade Comm'n v. Meta Platforms Inc.,* No. 5:22-CV-04325-EJD, 2023 WL 2346238, at *33 (N.D. Cal. Feb. 3, 2023); *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412, at *22 (N.D. Cal. July 10, 2023).

35 Press Release, Federal Trade Commission, FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal (Aug. 31, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-secures-settlement-ice-black-knight-resolving-antitrust-concerns-mortgage-technology-deal.

36 Press Release, Federal Trade Commission, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

37 Holly Vedova, Director, Bureau of Competition, Remarks at 12th Annual GCR Live: Law Leaders Global Conference (Feb. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/vedova-gcr-law-leaders-global-conference.pdf; *see also* Lina Khan, Chair of the Federal Trade Commission, Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf (Chair Khan's testimony before the U.S. Senate that the FTC "now strongly disfavor behavior remedies").

approval unless there was a "credible risk" of an unlawful future merger.[38] In July 2021 — one month after Chair Khan assumed office — the FTC rescinded the 1995 Policy Statement and reinstated its pre-1995 practice of requiring prior approval by parties subject to a merger consent order.[39] The agency explained that it undertook this policy change since prior approval provisions can prevent facially anticompetitive deals, preserve FTC resources, and detect anticompetitive deals below the reporting thresholds established under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act).[40]

In merger settlements, the FTC now requires the merged firm to obtain prior approval for any acquisitions of businesses or assets in the same relevant product or geographic markets where harm to competition was alleged in the transaction subject to the consent order for a minimum of ten years. Additionally, the FTC's current policy is to require buyers of businesses or assets divested pursuant to the consent order to obtain prior approval for any future sale of such businesses or assets for a minimum of ten years. The Commission also stated that it would consider the use of prior approval broader than the affected product and geographic markets when it believes additional relief is needed. Some factors the Commission considers include: (i) whether the acquisition is "substantially similar" to a prior challenged transaction; (ii) the current level of concentration or tend toward concentration over the past ten years; (iii) the degree to which the transaction increases concentration; (iv) the degree of the parties' pre-merger market power; (v) the parties' history of acquisitiveness; and (vi) evidence of anticompetitive market dynamics.

The FTC has required the merged firm to agree to prior approval provisions in all of its merger settlement agreements since the Commission announced the reversion to its prior policy. In three merger settlements, the FTC required prior approvals broader than the affected markets. The first involved the merger settlement for DaVita's acquisition of Total Renal Care, where the FTC required the prior approval to acquire dialysis clinics beyond the alleged relevant geographic market of greater Provo, Utah to the entire state of Utah.[41] The next two applied to settlements of acquisitions by portfolio companies of the private equity firm, JAB Consumers Partners, in their acquisitions of SAGE Veterinary Partners and VIPW/Ethos Veterinary Health. Citing "the growing trend towards consolidation in specialty and emergency veterinary services markets across the country, as well as the likelihood of future acquisitions by [JAB Consumer Partners] in these markets, many of which may be non-HSR reportable," the FTC required statewide prior approval provisions despite the locally alleged geographic markets in those challenges.[42]

The FTC required prior approval provisions that applied to the purchasers of the divested assets in all but the first two consent orders that contained divestiture remedies. Most of these orders require the divestiture buyer to obtain prior approval for any sale the divested assets (i) to any third party for three years and (ii) to any competitor for an additional seven years (ten years total). The two JAB Consumer Products consents require, however, require the divestiture buyers to obtain prior approval for the sale of any of the divested clinics to any third party for ten years.

The DOJ, on the other hand, has not asserted the authority to agree to prior approval provisions in its consent orders. However, the DOJ has required prior notice provisions in merger settlements "when there are competitors to the parties whose acquisition would not be reportable under the HSR Act, and when market conditions indicate that there is reason to believe their acquisition may be competitively significant in the wake of the transaction."[43] A prior notice provision establishes a process similar to the HSR review process, requiring the parties to submit the same information on the HSR Notification and Report Form and observe the same waiting periods for an initial filing and Second Request (if one is issued). However, unlike a prior approval order, where the FTC's affirmative approval is required, the FTC or DOJ must still sue to block a transaction that is only subject to a prior notice provision.

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38 Federal Trade Commission, FTC Acts to Reduce Prior-Approval Burden on Companies in Merger Cases (June 22, 1995), https://www.ftc.gov/news-events/news/press-releases/1995/06/ftc-acts-reduce-prior-approval-burden-companies-merger-cases.

39 Federal Trade Commission, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

40 Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (June 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

41 *Consent Order, In the Matter of Davita Inc., and Total Renal Care, Inc.* (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/cases/davita_acco_9_29_final.pdf.

42 *Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of JAB Consumer Partners/National Veterinary Associates/SAGE Veterinary Partners* (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110140C4766NVASAGEAAPC.pdf (requiring prior approval for acquisitions of specialty or emergency veterinary clinics in California and Texas for a period of ten years); *Analysis of Agreement Containing Consent Orders to Aid Public Comment* (June 29, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110174C4770JABEthosAAPC.pdf (requiring prior approval provisions for the acquisition of specialty or emergency veterinary clinics in California, Colorado, Virginia, Maryland, and the District of Columbia). The FTC also required nationwide prior notice provisions in JAB Consumer Partners' two merger settlements in addition to the statewide prior approval provisions.

43 Antitrust Division, U.S. Department of Justice, Merger Remedies Manual (September 2020), 31 https://www.justice.gov/atr/page/file/1312416/download.

The FTC's prior approval policy may influence its decision to accept a remedy rather than pursue litigation and therefore explain why it has entertained more settlements than the DOJ. First, the prior approval policy gives the FTC with leverage over the merged firm's future deals. It shifts the burden from the FTC demonstrate to a court that a merger is anticompetitive to the parties to convince the FTC that is not. Second, the policy as it applies to divestiture buyers helps to mitigate the risk of the divestiture buyer either selling to another party that presents competition concerns or stripping-and-flipping the divested business and thereby reducing competitive pressures in the affected markets.

V. A "UNIFIED" AND "COORDINATED" APPROACH TOWARDS FEDERAL-STATE COLLABORATION ON MERGER CONTROL

Federal antitrust agencies partnering with state AGs in merger enforcement is not new,[44] but both the FTC and the DOJ have taken steps to strengthen coordination with state officials.[45] The FTC, most recently, published an official protocol that sets forth a framework for the conduct of joint investigations between the Antitrust Division, the FTC, and state AG offices.[46] With respect to "settlement discussions" in particular, the protocol states: "While each federal and state governmental entity is fully sovereign and independent, an optimal settlement is most likely to be achieved if negotiations with the merging parties are conducted, to the maximum extent possible, in a unified, coordinated manner."[47]

One impact of closer collaboration between the federal agencies and state AGs is that state AGs have increased ability to coordinate with federal enforcers on litigation strategy and merger remedies. For example, New York, the District of Columbia, and Massachusetts have joined the DOJ's lawsuit blocking the JetBlue/Spirit merger.[48] And six state AGs and federal antitrust enforcers also joined forces in the lawsuit to stop the Amgen/Horizon merger; the states ultimately agreed to dismiss their lawsuit after the FTC reached a favorable settlement agreement with Amgen/Horizon.[49] By coordinating closely with states, the agencies have sought to strengthen merger enforcement, flexing all powers available to them, including the statutory powers of the states to monitor and enforce consent decrees or settlements.

VI. PRACTICE TIPS

Parties considering a merger or acquisition should consider the following in negotiating antitrust risk in the purchase agreement and in developing a strategy to overcoming any antitrust obstacles to closing.

- ***Be prepared to litigate***. Both the DOJ and the FTC have shown an increased willingness to sue to block transactions that raise competition concerns rather than to resolve such concerns by a divestiture or other remedy prior to litigation. And for the FTC, in particular, the agency has shown its willingness to continue to litigate in its administrative tribunal, even following loses at the preliminary injunction stage in Federal court. It could take up to 18 to 24 months, or even longer, especially in the case of administrative litigation, to fully litigate an agency merger challenge. For HSR notifiable transactions that may draw scrutiny from regulators, parties should consider upfront whether they want to commit to the costs and timeline of litigation and, if so, provide a sufficient termination date in the merger agreement to do so. For non-notifiable transactions, the acquiring party should consider the risk of a post-closing challenge and remedy. For transactions expected to draw close scrutiny from regulators, sellers are incentivized to negotiate antitrust reverse breakup fees or require the buyer to bear the costs of litigation.

- ***The investigating agency matters***. Under current leadership, the FTC has been willing to agree to a divestiture to remedy proposed competition concerns in lieu of litigation while the DOJ has not. The agencies have loosely divided jurisdiction over industries where they have developed expertise. Understanding which agency is likely to assert jurisdiction will impact strategy and whether a merger settlement is a likely option. The parties, in limited circumstances, may be able to influence which agency takes the transaction by approaching staff at the preferred agency before filing.

44 For example, states have traditionally joined the FTC and DOJ in challenging deals in the healthcare context.

45 Questions for the Record Jonathan Kanter Nominee to Be Assistant Attorney General of the Antitrust Division, *Questions from Senator Cruz* (Oct. 6 2021), https://www.judiciary.senate.gov/imo/media/doc/Kanter%20Responses%20to%20Questions%20for%20the%20Record.pdf.

46 Federal Trade Commission, Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations (last visited Oct. 12, 2023).

47 *Id.*

48 Press Release, Massachusetts Office of the Attorney General, AG Campbell Files Antitrust Lawsuit Challenging JetBlue's Acquisition of Spirit Airlines (March 7, 2023), https://www.mass.gov/news/ag-campbell-files-antitrust-lawsuit-challenging-jetblues-acquisition-of-spirit-airlines.

49 See *Consent Order, In the Matter of Amgen Inc. and Horizon Therapeutics plc.*, https://www.ftc.gov/system/files/ftc_gov/pdf/d09414amgenhorizonacco.pdf.

- ***Offering a complete divestiture package will maximize the chances of acceptance***. The agencies are most likely to accept the divestiture of an ongoing, stand-alone business, especially if a viable upfront purchaser of the business has been identified. However, the DOJ may still be skeptical if the transaction involves a dynamic industry, such as advanced technology markets.

- ***A fix-it-first or litigate-the-fix strategy may help improve the likelihood of success***. Merging parties may be able to reduce the risk of litigation by resolving the antitrust issues upfront with a "fix-it-first" strategy. For example, the merging parties could enter into an agreement with a third party to purchase one of the parties' overlapping businesses. This leaves the reviewing agency with the decision whether to litigate the adequacy of the remedy, or even whether to conduct an in-depth investigation in the first place. A "litigate-the-fix" strategy will also increase the merging parties' likelihood of success in litigation.

- ***Consider the impact of prior approval provisions***. Any acquiring party entering into a consent order with the FTC must be prepared to agree to a prior approval provision impacting, at the very least, future acquisitions in the markets affected by the transaction. If the acquiring party is considering other transactions in these relevant markets, it should consider the risk that the FTC will have leverage in stopping future transactions. Additionally, divestiture buyers should consider the impact of a prior approval provision on the valuation of the divested business given the additional regulatory constraints to reselling the business.

- ***Strategies for parties not willing to fight the agencies***. Some companies are not willing to commit to the time or cost of litigation. In these situations, sellers bear the brunt of the risk if the parties abandon the deal due to a challenge or delay in clearance. Given the increased risk of litigation, sellers are more incentivized to demand antitrust reverse breakup fees, both in frequency and amount.

- ***Do not forget about state enforcers***. The DOJ and FTC have invited closer coordination with State AGs, which means they can play a significant role in merger enforcement, especially where transactions present state-specific or local issues. Companies should not assume that satisfying a federal regulator may not be sufficient to settle a challenge by a particular state. Additionally, with increased federal and state cooperation, federal enforcers may be inclined to withhold settlement until all states are on board.

MARKET POWER AND COPYRIGHT: THE ASCAP AND BMI CONSENT DECREES

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In 2016 — and again in 2019 — the Department of Justice declined to rescind or modify two of its longest-standing consent decrees. The decrees at issue govern the conduct of two music licensing groups: the American Society for Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). The decrees date back to 1941 and, though they are periodically updated, have nevertheless remained standing through eight decades, fifteen Presidential administrations, numerous reviews, and dramatic changes in DOJ attitudes toward consent decrees generally. What can this tell us about copyright, market power, and the state of music licensing in the United States?

I. COPYRIGHT AND MARKET POWER

The debate over whether copyright protection grants a true monopoly is a fierce one.[2] On paper, the argument in favor seems straightforward: copyright allows firms to prevent the creation of perfect substitute goods. This view has the benefit of being widely repeated both in the literature[3] and at the Supreme Court.[4]

However, it also has its fair share of detractors.[5] These critics argue that, while copyright grants an ability to preclude creation of identical products, it falls short of creating true monopoly *power*:

> [Copyright] protection creates monopoly power only if substitutes are unavailable and entry barriers prevent the emergence of any such substitutes in the foreseeable future. Neither of these restrictive conditions is likely to be met with respect to copyright. Although some works exist for which there are few alternatives, substitutes are readily available for most works.[6]

In other words, most copyrighted works are not so inherently valuable in their originality that they lack "good enough" substitutes.

This view has some intuitive appeal. However, it suffers from two main defects. First, it assumes that copyright's ability to exclude extends only to perfect copies or substitutes. In reality, copyright's boundaries are fuzzy; its ability to exclude extends well beyond perfect substitutes to include works which are not identical, but are nevertheless "close enough" to affect the market for the original.[7] The more valuable a given

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2 For an alternative examination of copyright's role in market power, see Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 Wash. U. L. Rev. _, 12-15 (forthcoming, 2024), available at https:// ssrn. com/ abstract= 4496870.

3 See, e.g. S.J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, 8 Res. L. & Econ. 181, 184 (1986); Ian E. Novos & Michael Waldman, *The Effects of Increased Copyright Protection: An Analytic Approach*, 92 J. Pol. Econ. 236, 236-38 (1984); James Boyle, *Foreword: The Opposite of Property?*, Law & Contemp. Probs. at 1, 8 (2003); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 Chi.-Kent L. Rev. 1367, 1386-89 & n.76 (1998); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 Vand. L. Rev. 1799, 1801 (2000); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1700 (1988).

4 See, e.g. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2022) ("fair use … can help to keep a copyright monopoly within its lawful bounds"); *Georgia v. Public. Resource.Org, Inc.*, 140 S. Ct. 1498, 1503 (2020) ("The Copyright Act grants potent, decades-long monopoly protection for 'original works of authorship.'"); *Allen v. Cooper*, 140 S. Ct. 994, 1001 (2020) (referring to copyrights and patents as "monopoly rights"); *Golan v. Holder*, 565 U.S. 302, 346 (2012) (discussing "copyright's grants of limited monopoly privileges"); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) ("once the … copyright monopoly has expired, the public may use the … work at will and without attribution"); *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003) ("The monopoly granted by a copyright 'is not a monopoly of knowledge… .'"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing "the copyright monopoly granted by Congress"); *\Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907) ("The purpose of copyright law is … to secure a monopoly … ."); *Holmes v. Hurst*, 174 U.S. 82, 85 (1899) ("The right of an author to a monopoly of his publications is measured and determined by the copyright act … ."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884) ("The monopoly which is granted to [authors] is called a copyright ….").

5 See, e.g. Randal C. Picker, Copyright as Entry Policy: The Case of Digital Distribution, 47 Antitrust Bull. 423 at 2 (2002); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U.L. Rev. 212, 217 (2004); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 Harv. J.L. & Pub. Pol'y 108, 118 (1990) ("Rights to exclude are not monopolies just because the property involved is an intangible rather than something you can walk across or hold in your hand."); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197 (1996).

6 Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U.L. Rev. 212, 217 (2004).

7 Notably, this idea—that the "character and purpose" factor of fair use hangs heavily upon whether the two works share an overlapping market use—forms the doctrinal core of the Supreme Court's recent decision in *Andy Warhol Found. for the Visual Arts v. Goldsmith*:

> In a broad sense, a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create. A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide "the public with a substantial substitute for matter protected by the [copyright owner's] interests in the original wor[k] or derivatives of [it]," which undermines the goal of copyright.

43 S. Ct. 1258, 1276 (2023) (internal citations omitted).

work, the greater the incentive for firms to aggressively prosecute its close substitutes. That practical risk — and the eye-watering statutory damages attendant to a finding of infringement — can chill creation of works that stray too close to an existing high-value product.[8]

Second, exclusion power varies by market. Some value fungible works: "sound-alike" tracks are a staple of cinematic scoring and advertising;[9] romance novel enthusiasts are voracious readers[10] who actively organize their preferences around specific plot similarities between works.[11] In these scenarios, "close enough" substitutes can effectively compete with — and displace — copyrighted works in a more traditional model of competition.[12] But not all markets accommodate this kind of substitution.

Popular music streaming is driven overwhelmingly by consumer demand for a small subset of works whose rights to exclude are fiercely guarded and policed. To the end consumers whose preferences (and dollars) drive the market, popular music is non-fungible; a consumer who wants to listen to the new Lizzo album is not interested in a "close enough" substitute, even if they enjoy the substitute on its own merits.[13] Non-substitutable works represent a small percentage of the overall market output, but are the biggest economic drivers of the market.[14]

This dynamic of specific consumer preference and low substitutability gives labels price-setter power, or the ability to unilaterally determine the price of their products (in this case, licenses).[15] And while licensees are largely beholden to major rightsholders, this obligation is not reciprocal; rightsholders have their "pick of the litter," including music streaming services which enjoy the financial backing of enormous tech conglomerates. A rational rightsholder will thus set the price for its licenses at the maximum rate they believe the licensee can bear. This allows rightsholders to absorb any available surplus. Market observation — particularly the fact that no independent streaming service has ever posted a sustained profit — appears to validate this dynamic. [16]

II. ASCAP, BMI, AND THE MECHANICS OF MARKET POWER

Perhaps the two most well-known consent decrees in the entertainment world are those governing American Society for Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). Founded in the early 20th century, ASCAP and BMI are what are known as Performing Rights Organizations ("PROs") — membership-based organizations which bundle members' public performance

8 One need look no further than the infamous *Blurred Lines* case to acknowledge that copyright suits reach well beyond strict copying, and encompass works that, in the court's opinion, stray too close to another original work. *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018). For a broader review of the academic literature on strategic use of copyright against competitors, see Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439 (2009); Mark Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & Contemp. Probs. 185 (2007) (critiquing the strategic development of licensing markets as precluding fair use); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y U.S.A. 209 (1982) ("Copyright, which once protected only against the production of substantially similar copies … today protects against uses and media that often lie far afield of the original.").

9 This is largely attributable to a quirk in traditional video editing workflow: the use of existing tracks as placeholders—known as "temp music"—while cutting a scene. See, e.g. Every Frame a Painting, *The Marvel Symphonic Universe*, YouTube (Sep. 12, 2016) https://www.youtube.com/watch?v=7vfqkvwW2fs; Andrew Liptak, *How Hollywood's temp scores are hurting your favorite action movies*, Verge (Sep. 12, 2016) https://www.theverge.com/2016/9/12/12893622/hollywood-temp-scores-every-frame-a-painting-film; Simon Power, *Temp Tracks: A Movie's Secret Score*, Shockwave Sound (Oct. 10, 2018), https://www.shockwave-sound.com/blog/temp-tracks-a-movies-secret-score/.

10 See *Literary Liaisons: Who's Reading Romance Books?*, Nielsen (Aug. 2015), https:// www. nielsen. com/ insights/ 2015/ literary- liaisons- whos- reading- romance- books/ ("6% of buyers purchase romance books more than once a week, and 15% do so at least once a week. … 25% of buyers read romance more than once a week, and nearly half do so at least once a week; only 20% read romance less than once a month."); Christine Larson, *Open networks, open books: gender, precarity and solidarity in digital publishing*, Info., Commc'n & Soc'y (2019) (noting that "romance readers read more than four times as many books annually as the average American").

11 Elena Burnett et al., *From meet-cutes to happy endings, romance readers feel the love as sales heat up*, NPR (Feb. 13, 2023) https:// www. npr. org/ 2023/ 02/ 13/ 1154798284/ romance- books- club- novel- group- reading ; Ann Kjellberg, *How Amazon Turned Everyone Into a Romance Writer (and Created an Antitrust Headache)*, Observer (Sep. 12, 2022), https:// observer. com/ 2022/ 09/ how- amazon- turned- everyone- into- a- romance- writer- and- created- an- antitrust- headache /; Alyssa Palmer, *Deconstructing Tropes in Popular Romance Fiction* (2021) at 3, https:// alyssalinnpalmer. com/ wp- content/ uploads/ 2023/ 05/ Deconstructing- Tropes- in- Popular- Romance-Fiction- Alyssa- PalmerID3513585- MAIS601Final. pdf .

12 Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 Tex. L. Rev. 989, 1041-42, 1072-83 (1997), discussing Edmund Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. 265 (1977).

13 Sherwin Rosen, *The Economics of Superstars*, 71 Am. Econ. Rev. 845 (1981), https:// www. jstor. org/ stable/ 1803469 .

14 Emily Blake, *Data Shows 90 Percent of Streams Go to the Top 1 Percent of Artists*, Rolling Stone (Sep. 9, 2020), https:// web. archive. org/ web/ 20230209193737/ https:// www. rollingstone. com/ pro/ news/ top- 1- percent- streaming- 1055005 /.

15 *Price-setter*, Oxford Dictionary of Economics (3d ed. 2009).

16 For a more in-depth discussion of the financial and market state of digital streaming platforms, see Meredith Rose, *Streaming in the Dark: Competitive Dysfunction within the Music Streaming Ecosystem*, 13 Berkeley J. Ent. & Sports L. __ (2024). Preprint available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4586800.

rights and offer them as "blanket licenses." These blanket licenses were immensely valuable to radio stations, live music venues, and others, because they eliminated the cost of identifying, locating, and negotiating independently with thousands upon thousands of composers and publishers.[17]

Prior to 1939, ASCAP exercised a functional monopoly on blanket licenses. This led to predictable anticompetitive results, the most egregious of which was ASCAP simultaneously refusing to offer individual or per-use licenses, while also prohibiting its members from directly negotiating with licensees. This forced all licensees, regardless of size or need, to purchase sweeping blanket licenses through ASCAP, and ASCAP alone.[18] These licenses were often priced as a percentage of the station's revenue, regardless of whether (or how much) ASCAP music had actually been aired. A proposed rate hike in 1939 led broadcasters to boycott ASCAP and form BMI as a competing PRO. It was not long before the Department of Justice waded into the debate by suing ASCAP for antitrust violations; both PROs entered into roughly parallel consent decrees in 1941, and remain under modified versions to this day.[19]

The specifics have shifted over the intervening decades, but the core features of the decrees remain largely unchanged. ASCAP and BMI may not interfere with their members' ability to directly license;[20] discriminate between similarly situated licensees;[21] or base their licensing rates upon performance of works not within their own catalog.[22] In addition to blanket licenses, both PROs must offer per-program licenses.[23] And, importantly, all licenses must be technologically neutral and "through-to-the-audience."[24] This means that the license encompasses public performance by the licensee and any intermediary necessary to deliver the performance to the end audience — an important distinction as new technologies develop layered delivery mechanisms.[25]

The decrees' endurance is a testament the tremendous market power that ASCAP and BMI's blanket licenses continue to wield. The Supreme Court itself has noted that these blanket licenses would, in the absence of standing consent decrees and rate courts, likely violate antitrust law.[26] In other words, the efficiency benefits created by PROs do not exist in *spite* of the consent decrees, but largely flow *from* them. Take, for example, catalog transparency. In theory, a licensee who wanted to avoid dealing with either PRO could simply choose to not perform its

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17 "The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author, or—heaven forfend the legal ramifications!—the manifold unascertainable and unlocatable heirs, assigns, or other legal representatives of the composer and author." Sigmund Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 L. & Contemp. Probs. 294, 297 (1954).

18 Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 Fordham Intell. Prop. Media & Ent. L.J. 733 (1998).

19 The Department of Justice chose to largely ignore BMI in favor of prosecuting ASCAP. Although BMI's consent decree sprang in part from "alleged legal infirmities somewhat akin to those of ASCAP," its adoption was more strategic than legal: the two PROs had been engaged in a long and bitter feud, and BMI's acquiescence to a consent decree forced ASCAP's hand to accept one as well. Sigmund Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950,* 19 L. & Contemp. Probs. 306 (1954). See also, Sol Taishoff, *War Against ASCAP Believed Nearly Won*, Broad. Mag. (Jan. 27, 1941), *available at* https:// web. archive. org/ web/ 20230220033834/ https:// worldradiohistory. com/ Archive- BC/ BC- 1941/ 1941- 01- 27- BC. pdf .

20 *United States v. Am. Soc'y of Composers, Authors & Publishers*, Civ. Action No. 41-1395 (WCC) at 6 (S.D.N.Y. Jun. 11, 2001) (Second Amended Final Judgment) [hereinafter *ASCAP Consent Decree]; United States v. Broadcast Music, Inc.*, No. 64-Civ-3787, at 3 (S.D.N.Y. Nov. 18, 1994) (Amended Final Judgment) [hereinafter *BMI Consent Decree*].

21 *ASCAP Consent Decree* at 7; *BMI Consent Decree* at 4.

22 *ASCAP Consent Decree* at 8; *BMI Consent Decree* at 5.

23 *ASCAP Consent Decree* at 9-11*; BMI Consent Decree* at 5.

24 *ASCAP Consent Decree* at 8; *BMI Consent Decree* at 2.

25 See, e.g. Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, Remarks as Prepared for the Vanderbilt University Law School: *"And the Beat Goes On": The Future of the ASCAP/BMI Consent Decrees* (Jan. 15, 2021), available at https:// web. archive. org/ web/ 20230217220619/ https:// www. justice. gov/ opa/ speech/ file/ 1355241/ download .

26 When considering the dispute between BMI and broadcasting giant CBS, the Court went out of its way to emphasize the necessity of both the rate court and the standing decrees:

> [I]t cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain.

Broadcast Music, Inc. (BMI) v. Columbia Broadcasting System (CBS), Inc., 441 U.S. 1, 13 (1979).

music. In this situation, the strategically optimal move is for the PRO to obfuscate the contents of its catalog. Copyright's famously high statutory damages (reaching $150,000 per infringement) is enough to ensure that a rational licensee operating at scale will purchase the blanket license simply as a form of liability insurance. Notably, this problem is not purely theoretical. In 2011, ASCAP failed to follow its own internal transparency rules, because a member publisher believed that doing so would put it at a negotiating disadvantage.[27] Lack of catalog transparency remains, to this day, a recurring complaint among licensees of all sizes.[28]

Direct licensing — the availability of which depends entirely the consent decrees — is a similarly important check on ASCAP's and BMI's market power. Direct licensing both prevents licensees from being strong-armed into blanket licenses, and exerts indirect pressure on the pricing and terms of the PROs' official licenses. Unsurprisingly, PROs have historically resisted the practice. While the consent decrees mandate that ASCAP and BMI allow direct licensing,[29] two much smaller, more recent PROs — Global Music Rights ("GMR") and SESAC — have both been accused of blocking their members from directly contracting with licensees.[30] A court determined that SESAC had obscured the contents of its repertory specifically to prevent licensees from identifying the parties with whom they needed to negotiate;[31] GMR was accused of a similar practice, but the case settled before the court could rule on the merits.[32]

Finally, it is important to note that although PROs compete for membership (via better rates, transparency, and representation),[33] there is no need for them to compete for buyers of blanket licenses. Radio stations, broad-catalog streaming services, and live venues are all captive buyers for all four PROs' blanket licenses. This is largely due to the practice of fractional licensing — a system under which any joint rightsholder (such as one songwriter out of four credited for a given song) can only license their "fraction" of the work. To publicly perform a song with multiple credited songwriters, a licensee must clear each writer's share separately, even when the writers are represented by different PROs. Failure to clear any one of the relevant rights constitutes copyright infringement. This system may be administrable in a universe where most songs have one or two songwriting credits; we do not, however, live in that world.[34] In 2016, most "popular mainstream songs ha[d] (on average) at least four writers and six publishers each,"[35] and thirteen of that year's top 100 hits had eight or more songwriter credits attached.[36] DSPs cannot, therefore, reasonably avoid contracting with a disfavored PRO. Thus, PROs, while incentivized to compete for *members*, have no need to compete against one another for *licensees*.

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27 *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 345 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers,* 785 F.3d 73 (2d Cir. 2015).

28 See, e.g. Comments of Future of Music Coal. at 12 ("Under the Consent Decrees, ASCAP and BMI have struggled with transparency in internal and external matters."); Comments of Comput. & Commc'n Indus. Ass'n at 4-7 ("PROs should not simultaneously be empowered to control a large and economically significant swath of cultural works, and at the same time be permitted to obscure the boundaries of that dominion."); Comments of NCTA at 5 ("The lack of transparency in the current system is a significant impediment to concluding transactions; creating greater transparency in these respects would have significant efficiency benefits ... The existing ASCAP and BMI song databases are fundamentally inadequate for users seeking to identify, for example, the songs licensable on a publisher-by-publisher or writer-by-writer basis."); Comments of Nat'l Ass'n Broad. at 4 ("Lack of meaningful access to [licensing] information has increased transaction costs and hindered licensing activities—both direct and collective."); Comments of Netflix at 17 ("the lack of transparency to users can lead to material information imbalances or asymmetries between licensors and licensees—which render a marketplace setting demonstrably noncompetitive"); Comments of Radio Music Licensing Comm. at 32; Comments of Nat'l Religious Broad. Music Licensing Comm. at 10 (noting that "[t]he PROs themselves disclaim the accuracy of their database.").

29 *ASCAP Consent Decree* at 6.

30 "[E]ven where a station is willing to try to operate without using GMR's 'must have' repertory, GMR does not make available a feasible and reliable method that radio stations can use to determine, with any level of confidence, what works they would need to avoid playing in order to operate without risk of copyright infringement." Complaint, *Radio Music License Comm. v. Glob. Music Rts.*, No. 16-6076 (E.D. Pa., Mar. 29, 2019). The case settled in 2022.

31 *Radio Music License Comm. v. SESAC,* No. 12-cv-5087, Report and Recommendation at 29 (E.D. Pa., Dec. 20, 2013).

32 *Radio Music License Comm. v. Glob. Music Rts., supra* note 30.

33 Both ASCAP and BMI post detailed information about royalty calculations and payment schedules on their websites. *ASCAP Payment System: How ASCAP Calculates Royalties*, ASCAP, https:// web. archive. org/ web/ 20230217200405/ https:// www. ascap. com/ help/ royalties- and- payment/ payment/ royalties (last visited Feb. 17, 2023); *How We Pay Royalties: General Royalty Information*, Broad. Music Inc., https://web.archive.org/web/20230217200535/https://www.bmi.com/creators/royalty/general_information (last visited Feb. 17, 2023).

34 Nor, of course, do consumers structure their preferences around PRO affiliation.

35 Daniel Sanchez, *The Average Hit Song Has 4+ Writers and 6 Different Publishers*, Digit. Music News (Aug. 2, 2017), https:// www. digitalmusicnews. com/ 2017/ 08/ 02/ songwriters- hit- song /.

36 There are multiple reasons for this trend. Many are industry-specific; none show any signs of abating. Mark Sutherland, *Songwriting: Why it takes more than two to make a hit nowadays,* Music Week (May 16, 2017), https:// www. musicweek. com/ publishing/ read/ songwriting- why- it- takes- more- than- two- to- make- a- hit- nowadays/ 068478_.

III. CONCLUSION

The continued existence of the ASCAP and BMI consent decrees seems, to music industry outsiders, to be an anomaly. The reality is far more complex: the unique characteristics of popular music, copyright law, and the mechanisms of market power create specific risks that can only be addressed through ongoing monitoring and antitrust enforcement. As copyright becomes ever more central to our economy, policymakers, litigators, and industry professionals should further scrutinize its intersection with — and effects on — competition policy.

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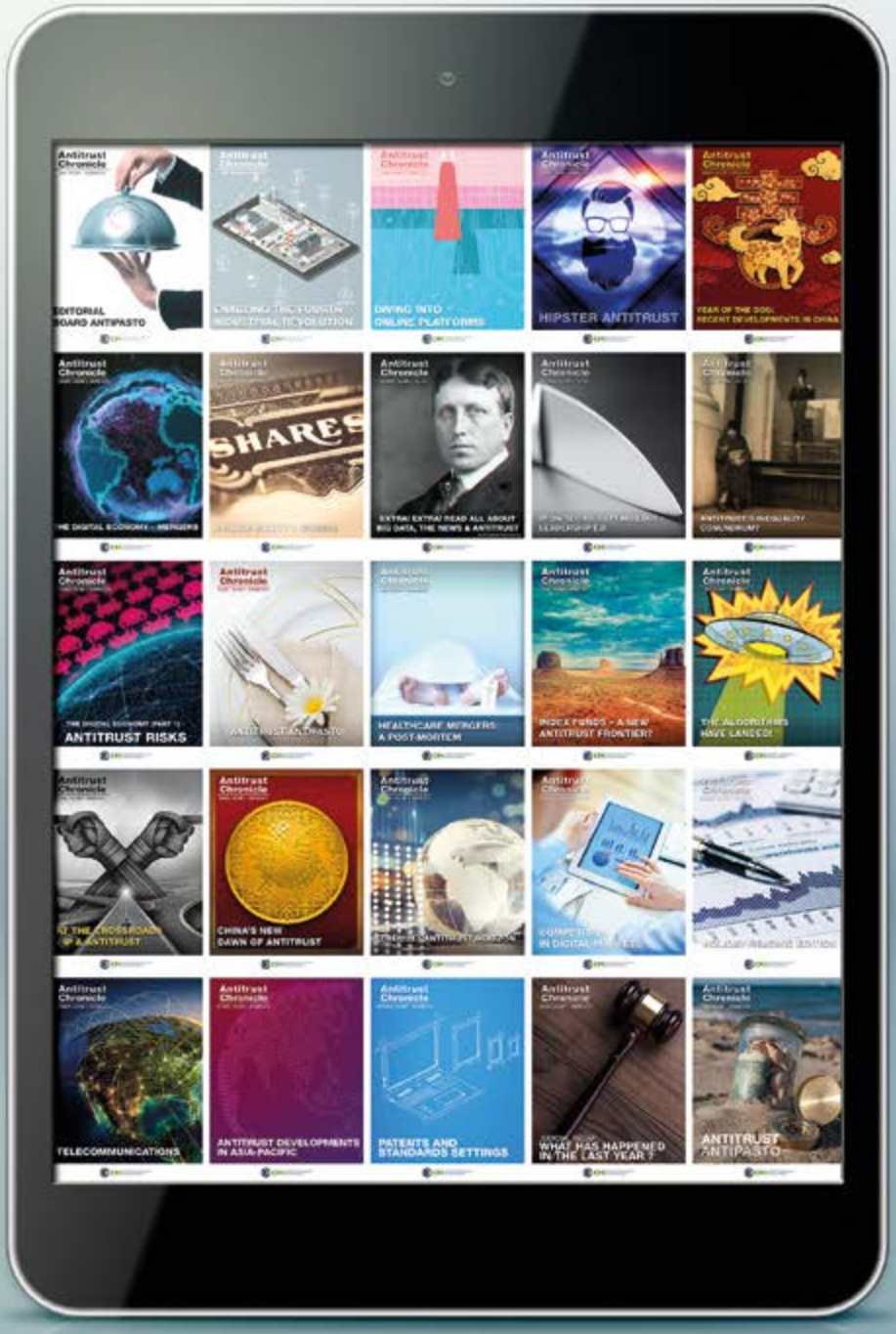


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