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NOTES

The Federal Trade Commission, Injunctive Relief, and Allegedly Anticompetitive Mergers: Preliminary Relief Under the Federal Trade Commission Act

Section 13(b) of the Federal Trade Commission Act permits the Federal Trade Commission (FTC) to petition a district court to enjoin preliminarily an acquisition or merger which the Commission believes will violate the antitrust laws. The Act provides that a court may enjoin a proposed acquisition when, upon "weighing the equities and considering the Commission's likelihood of ultimate success," the injunction would be in the public interest. The public interest standard, against which the propriety of injunctive relief is measured, is substantially different from the traditional equity standards governing interim relief in civil cases. Section 13(b) provides in full:

Whenever the Commission has reason to believe—
(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

2 The § 13(b) power to seek preliminary relief extends to anticompetitive behavior outside the merger and acquisition context. See, e.g., FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982); FTC v. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976). This note, however, deals exclusively with § 13(b) as applied to an underlying substantive claim based on § 7 of the Clayton Act. The latter prohibits acquisitions whose effects "may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18 (1982).
4 Preliminary relief in the federal courts is generally sought pursuant to Federal Rule of Civil Procedure 65. Traditionally, standards for preliminary injunctions have focused on the plaintiff's likelihood of success on the merits, the prospects of irreparable harm, the comparative hardships on the parties, and sometimes, the impact of the requested relief on the public interest. Leubsdorf, The Standard for Preliminary Injunctions, 91 HARV. L. REV. 525, 525-26 (1978). See also 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE
13(b) does not, however, specify what this public interest entails and courts have treated section 13(b) petitions in an inconsistent fashion.\(^5\)

This note considers the appropriate standards by which courts should evaluate FTC requests for preliminary injunctions under section 13(b). It suggests that a proper judicial analysis must pursue a wide-ranging inquiry into the precise facts and into the various public and private equities of each case to determine whether preliminary relief will serve the public interest. The note proposes, in light of the often anticompetitive practical effects of issuing a full-stop order and the limitations of section 13(b) summary proceedings, that courts should grant the FTC injunctions only in the most egregious cases. Instead, courts should permit consummation of the merger by denying the injunction or by forcing the FTC to rely on well-conceived hold separate decrees pending full administrative adjudication on the underlying merits. This sort of interim relief, along with the traditional remedy of divestiture, protects the public interest in effective antitrust law enforcement without discouraging procompetitive business decisions which promote consumer welfare.

This note initially considers the legislative framework of section 13(b) and proposes some practical and policy considerations which should guide section 13(b) analysis. It then discusses the FTC's interpretation of section 13(b) and the way in which the law has been applied by the courts. Finally, the note explores the statute's command to weigh the equities as the correct focal point of section 13(b) litigation and examines two recent decisions.

**THE FEDERAL TRADE COMMISSION ACT SECTION 13(b): ITS UNDERLYING BASES**

Section 13(b) is one-half of a legislative scheme designed to improve the FTC's ability to enforce section 7 of the Clayton Act\(^6\) at the premerger stage.\(^7\) Prior to 1973, the Commission was without express statutory authority to seek preliminary relief in section 7 cases; instead, the FTC's exclusive statutory remedies consisted of cease and desist and post-

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\(^5\) See infra notes 59-101 and accompanying text.


\(^7\) The other half of this premerger legislative scheme is found at 15 U.S.C. § 18(a) (1982). It contains notification provisions which prohibit the acquisition of the voting securities of certain corporations unless advance notice is given to the Justice Department and the FTC. The Act specifies a waiting period before the acquisition can be finalized during which the Justice Department and the FTC have an opportunity to evaluate the competitive effect of the proposed transaction. The government may request additional relevant information to conduct its evaluation. For a thorough discussion of the premerger notification provisions, see Comment, *The Goal of the New Premerger Notification Requirements: Preliminary Relief Against Anticompetitive Mergers*, 1979 Duke L.J. 249.
acquisition divestiture orders as authorized by the Clayton Act. To compensate for the perceived deficiency of these traditional remedies, the Commission used the All Writs Act as an alternative route to premerger intervention. The Act allowed the FTC to petition directly to the court of appeals to enjoin an allegedly anticompetitive acquisition. This procedure, however, was rife with procedural impracticalities and doctrinally unsound. Section 13(b) gave the district courts jurisdiction to entertain FTC petitions for preliminary relief and eliminated the Commission's need to resort to the All Writs Act.

The precise language of section 13(b) and its legislative history offer little guidance in assessing the proper judicial role in ruling on the propriety of premerger injunctive relief. The section was initially attached to the Trans Alaska Pipeline Authorization Act by floor amendment and was accorded only two paragraphs in the final Conference Report. From study of the legislative history, only the following can be affirmatively asserted. Courts applying section 13(b) are not to use traditional equity analysis because the statute codifies a "public interest" standard which is more appropriate where an independent regulatory agency is enforcing a federal law. This public interest approach is emphasized by the absence of any reference to "irreparable harm"—a traditional requisite to preliminary relief—in the statutory language. On the other hand, Con-

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9 28 U.S.C. § 1651(a) (1976) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."
10 FTC v. Dean Foods Co., 384 U.S. 597 (1966) held that under the All Writs Act, the FTC could get interim relief blocking the merger only upon establishing, in the court of appeals "that an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile." Id. at 605. The case involved the respondent's acquisition of Bowman Dairy Company, a substantial competitor in packaged milk sales in the Chicago area. According to the Commission's allegations, accepted as true by the Court, id. at 601, Dean Foods planned to liquidate and distribute among Bowman shareholders that part of the acquired corporation it did not consolidate into its own corporate structure. Id. at 599. Bowman "would consequently cease doing a dairy business" in Chicago and consummation of the merger would prevent the Commission from devising an effective remedy after its decision on the merits. Id. at 599-600.
14 The report states that "[t]he intent is to maintain the statutory or 'public interest' standard which is now applicable, and not to impose the traditional 'equity' standard .... " Id.
15 Although Kelley, supra note 11, at 10, argues that the absence of "irreparable harm" means Congress intended that the FTC should be able to obtain preliminary injunctions in almost every case, this interpretation is hardly encouraged by the statute. Instead, irreparable harm is merely presumed from a showing of likelihood of success. See FTC v.
gress preserved and articulated the duty of the courts to "exercise independent judgment" in ruling on the propriety of an injunction in any particular case. After completing the analysis mandated by section 13(b), the district court may enjoin the merger; the law does not command that the court shall issue the injunction. This reliance upon judicial discretion finds a parallel in the traditional equity analysis of preliminary relief. Finally, the report indicates that congressional intent was to codify previous case law and not to mandate a new analytical approach to preliminary injunctions sought by the government.

The purpose of section 13(b) has been more adequately defined by the courts. In FTC v. Great Lakes Chemical Corp., the court held that section 13(b) was not enacted to authorize automatic injunctions; rather, section 13(b) was enacted "to preserve the ability to order effective, ultimate relief [and] not to bar all mergers that the FTC staff preliminarily views as suspicious." The view that the purpose of section 13(b) is to preserve the ability to order ultimate relief accurately reflects the Supreme Court's concern in FTC v. Dean Foods that consummation of the proposed acquisition would have rendered "an effective remedial order ... virtually impossible."

Weyerhaeuser Co., 665 F.2d 1072, 1082 & n.23 (D.C. Cir. 1981). In fact, the FTC still argues that it will suffer "irreparable harm" should the injunction not issue in every case in its assertion that postacquisition divestiture is an inadequate and ineffective remedy following an adjudication on the merits.

In Weyerhaeuser the court emphasized that "Congress expressed a plain purpose to codify decisional law, not to straightjacket it [and that consequently] § 13(b) does not 'mandate' remedial rigidity." 665 F.2d at 1084.


Id. at 99.

Id. at 87 (citing FTC v. Exxon Corp., 1979-2 Trade Cas. (CCH) ¶ 62,972, at 79,538 (D.D.C. 1979), affd, 636 F.2d 1336 (D.C. Cir. 1980)); see also Weyerhaeuser, 665 F.2d at 1083-84. A law review note has further observed:

A court hearing a request for preliminary order must determine how best to create or preserve a state of affairs such that it will be able, upon conclusions of the full trial, to render a meaningful decision for either party. Only the necessity of judicial intervention for the accomplishment of this purpose justifies imposing upon the defendant the burden of conforming to an order granted after a summary proceeding.


Id. at 605. This assertion is also supported by the decision in Exxon where the court stated that Dean Foods illustrated the "concerns [which] later motivated Congress to grant the FTC, in §§ 13(b), the express authority to petition in District Court for a temporary restraining order or preliminary injunction." 636 F.2d at 1343. See also Weyerhaeuser, 665 F.2d at 1085 ("the underlying intent [of § 13(b)] is to secure effective antitrust enforcement"). See generally supra note 10.
Case law interpretation of the purpose of section 13(b) confirms the view that section 13(b) was meant to reform the preliminary relief process under the All Writs Act. The earlier process was procedurally awkward, requiring an ill-equipped court of appeals to receive evidence and hear witnesses as a trial court. Furthermore, judicial intervention under the All Writs Act could be analytically justified only if such intervention was required to preserve the appellate jurisdiction of the court of appeals being petitioned. The burden of proof thus imposed upon the FTC was necessarily harsh. The Court's 5-4 split in *Dean Foods* and the strong, well-reasoned dissent by Justice Fortas illustrate that any use of the All Writs Act in the section 7 context was a close and controversial question. *Dean Foods* thus represents the Supreme Court's concern with the inadequacy of postmerger divestiture and the need for a procedure to allow the FTC to intervene at an earlier point in section 7 enforcement.

The inadequacy of divestiture in certain cases and the procedural and substantive problems incurred by resort to the All Writs Act were the impetus for the enactment of section 13(b). The FTC undeniably needed a procedure by which it could intervene more easily into the early stages of possible anticompetitive behavior and section 13(b) gave the Commission this procedure. The statute specifies the proper tribunal and the standard by which FTC petitions for injunctive relief are to be evaluated. Nothing, however, in the statute or its legislative history, supports the assertion that obtaining the injunction should be substantively easier than prior procedure. In fact, the legislative history of the premerger notification statute supports the opposite conclusion. The most affirmative

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26 *Dean Foods*, 384 U.S. at 605 (requiring a showing that effective postmerger relief be "virtually impossible" before intervention is justified); see also Halverson *supra* note 11, at 877-78.
27 384 U.S. at 612. The dissenters argued:

The statements in the Court's opinion indicating that its result is necessary unless we are to "stultify congressional purpose" fly in the teeth of the record, plainly written and repeatedly reiterated. Congress is keenly interested in enforcement of § 7. But it has demonstrated over and over again that it has no interest in arming the Commission with the power today conferred upon it.

*Id.* at 613 (Fortas, J., dissenting).
28 See *infra* note 42. See also *Dean Foods*, 384 U.S. at 608-11.
29 Certain commentators have argued, however, that the issuance of a preliminary injunction should be virtually automatic, see, e.g., L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 215, at 671 (1977) ("courts ought to be disposed to enter orders maintaining the status quo whenever the government offers by affidavits a colorable case . . . ."), but automatic injunctions were explicitly rejected by Congress. See *infra* note 31.
31 The premerger notification statute, 15 U.S.C. § 7(a) (1982), as originally introduced, provided for an automatic stay of the proposed merger solely upon certification by the FTC that the public interest required relief pendente litem. This power was resolutely denounced. See, e.g., 122 CONG. REC. 15,420 (1976) (remarks of Sen. Percy). See also *supra* note 7.
statement that can be made about section 13(b) as passed is that a procedure for seeking preliminary relief should and will be more easily accessible to the FTC.

MAKING THE SECTION 13(b) DECISION

Guiding Principles

The district court under section 13(b) may enjoin a merger when, after weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest. The application of this "public interest" standard has caused the courts considerable trouble and the section 13(b) cases develop divergent approaches. At one extreme is the decision in FTC v. Food Town Stores, Inc., in which the judicial role in section 13(b) cases was effectively relegated to that of a mere rubber stamp on the FTC's motion to enjoin the merger. The Food Town Stores court failed to acknowledge the primary purpose of section 13(b) by refusing to consider the defendant's argument that divestiture would be an adequate remedy should an antitrust violation ultimately be found. Furthermore, the court's balancing of the equities excluded any private harm which may have resulted from enjoining the acquisition and rejected, as too speculative, any consideration of the public benefits expected to flow from the merger. This case rejects the discretion and independent judgment which Congress explicitly required the courts to exercise in section 13(b) cases and establishes a rule which guarantees that the FTC will obtain every injunction it seeks.

The other end of the interpretive spectrum is best represented by FTC v. Weyerhaeuser Company. In Weyerhaeuser, the lower court refused to
enjoin a merger even though it has found that the Commission had established a “likelihood of success on the merits.” While the precise result in *Weyerhaeuser* may be an anomaly not envisioned by Congress, the fact that courts have the power to make such a decision consistent with section 13(b) is the headstone of this note’s thesis. The proper judicial approach to section 13(b) cases must be built around the rationale, both express and unarticulated, at the core of the *Weyerhaeuser* ruling. This rationale is developed below.

*Section 13(b) Litigation: The Practicalities*

Several undeniable practicalities are inherent in any section 13(b) litigation. These factors shape the proposed analysis and their importance should not be understated. The major catalyst in the legislation of section 13(b) was the perceived inadequacy of postadjudication divestiture as an effective remedy to section 7 violations. This congressional and


45 *Weyerhaeuser*, 1981-1 Trade Cas. (CCH) ¶ 63,974, at 76,047. Instead, the district court entered a hold separate order—a type of preliminary relief less drastic than an injunction—which requires the acquiring company to preserve the acquired assets as a viable competitive entity pending administrative adjudication of the antitrust claims. *Id.* at 76,048. The entry of the hold separate order was affirmed by the court of appeals. FTC v. Weyerhaeuser, 665 F.2d 1072, 1091 (D.C. Cir. 1981).

46 *Weyerhaeuser*, 665 F.2d at 1083-86. The *Weyerhaeuser* court of appeals recognized that when the Commission establishes a likelihood of success, a preliminary injunction should probably issue. *Id.* at 1085. However, the court noted that the statutory language is permissive, not mandatory, and held that an injunction need not issue where significant equities favor the transaction and a hold separate order can realistically be expected to safeguard the possibility of successful ultimate relief and prevent interim competitive harm. *Id.*

At least one court has held that where a less severe remedy, such as a hold separate order, will protect the public from interim competitive harm, a preliminary injunction should not issue. United States v. Culbro Corp., 436 F. Supp. 746 (S.D.N.Y. 1977). Cf. Pfunder, Plaine & Whittemore, *Compliance with Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 Antitrust Bull. 19, 117 (“If divestiture can provide adequate . . . relief . . . then preliminary injunctions can be granted sparingly.”); Leubsdorf, *supra* note 4, at 541 (“If the final judgment can remedy the plaintiff’s injury, there is no reason to grant immediate protection which may turn out to be based on error”).

47 Halverson describes the divestiture problem as follows:

In instances when production facilities have been integrated into the corporate structure of the acquiring firm, it can be predicted that divestiture is less likely to cure the competitive problem created by a merger than when facilities have been kept separate. An additional consideration, especially in industries involving special know-how or technological expertise, is whether key management and other highly skilled personnel are likely to have been transferred or discharged and thus no longer available to their prior employer. Further, if transfer of technological expertise and trade secrets from the acquired firm to the acquiring firm has occurred after merger, divestiture becomes a remedy of questionable value in restoring competition to its original state. The process of corporate absorption can further sap the competitive vitality of the
judicial concern is well placed; however, it is also true that divestiture is not always as inadequate a remedy as the FTC argues. When the merger involves only a stock acquisition, the threat of integration and consequent inadequacy of divestiture is not substantial. Furthermore, in mergers which entail the acquisition of physical assets or of low or similar technology, divestiture may adequately protect the public interest in maintaining a competitive market. Considering that the major purpose of section 13(b) is to preserve the ability to order effective and ultimate relief, where the court finds divestiture to be an effective postmerger remedy, a preliminary injunction may not serve the public interest. Though the occasional inadequacy of divestiture implicates a policy of preventive enforcement, there is strong support to argue that the limited goals of section 13(b) should be implemented in the least restrictive fashion. First, while most courts decide section 13(b) cases following expedited discovery and a brief evidentiary hearing, an injunction could potentially issue without any hearing at all. Even where the standard abbreviated hearing is held, it involves only a preliminary evaluation of the merits under a relatively light burden using relaxed rules of evidence. The court’s decision must necessarily be based on an “imperfect, incomplete and fragile

market and undermine the curative powers of divestiture when the management of the newly combined enterprise begins to participate in joint planning, strategy, and decision making processes which affect the future status of competition in the market. In these circumstances, by the time the illegality of the acquisition is finally established, there may be no practical way to devise an effective remedy that will reestablish the merged firm as a viable competitive entity.

Halverson, supra note 11, at 875-76. See also FTC v. Rhinechem Corp., 459 F. Supp. 785, 787 (N.D. Ill. 1978) (the “statutory enactment [of § 13(b)] manifests Congress’ concern with the FTC’s historic inability to effectuate a remedy once an acquisition is consummated.”); FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1096 (S.D.N.Y. 1977); Elzinga, The Antimerger Law: Pyrrhic Victories?, 12 J.L. & Econ. 43 (1969); Kelley, supra note 11, at 4 n.11.

4 L. SULLIVAN, supra note 29, at 670 n.6.


See, e.g., Lancaster Colony, 434 F. Supp. at 1091 (“... we see no need for an evidentiary hearing nor for extensive analysis of the underlying antitrust issues.”); 1 S. KANWIT, FEDERAL TRADE COMMISSION 10-13 to -14 (1981) (the FTC “may also grant or deny such relief without holding a hearing”).
factual basis"48 and any court's evaluation of the merits based on such a record must be of limited reliability.49

The second, and integrally related, point is concerned with the precise and practical effect of a section 13(b) injunction. Courts have long acknowledged that the issuance of a preliminary injunction prior to a full trial on the merits is an "extraordinary and drastic remedy." This is "particularly [true] in the merger and acquisition context"50 where experience has demonstrated that "the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom" of the proposed merger.51 In fact, in the three section 13(b) cases in which the FTC has received full injunctions blocking the mergers, the proposed acquisitions

48 Lancaster Colony, 434 F. Supp. at 1091.
49 In each of the § 13(b) cases which has proceeded to an ultimate decision on the merits, the preliminary evaluation of the antitrust allegations performed by the district court proved to be wrong. In the British Oxygen litigation, the district court found that the FTC had demonstrated a likelihood of success on the merits and issued a preliminary remedy. The Commission also ruled against the defendants in the administrative hearing but the court of appeals reversed on the merits. Compare FTC v. British Oxygen Co., 1974-1 Trade Cas. (CCH) ¶ 75,003 (D. Del. 1974) with British Oxygen Co., 86 F.T.C. 1241 (1975) with BOC Int'l Ltd. v. FTC, 557 F.2d 24 (2d Cir. 1977). In the Beatrice Foods cases, the district court and the court of appeals found that the FTC had not established a likelihood of ultimate success, but an FTC administrative law judge ruled for the Commission on the merits. Compare FTC v. Beatrice Foods Co., 587 F.2d 1225 (D.C. Cir. 1978) with Beatrice Foods Co., 3 Trade Reg. Rep. (CCH) ¶ 21,775 (Nov. 21, 1980). In FTC v. Tenneco, Inc., both the district court and an FTC administrative law judge ruled that the FTC would not succeed on the merits, but those holdings were reversed by the full commission. Compare FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977) and Tenneco, Inc., 3 Trade Reg. Rep. (CCH) ¶ 21,700 (May 27, 1980) with In re Tenneco, Inc., 98 F.T.C. 464 (1981). Perhaps the strongest argument for the approach to § 13(b) adjudication urged in this note is found in the Weyerhaeuser cases. As discussed more fully at infra notes 114-56 and accompanying text, the district court in Weyerhaeuser acknowledged a likelihood of success on the merits but nonetheless refused to enjoin the proposed merger. Weyerhaeuser, 1981-1 Trade Cas. (CCH) ¶ 63,974 (D.D.C. 1981). The court of appeals also found that the FTC had made a strong showing on the merits but affirmed the lower court's decision recognizing the inherent limitation on judicial capacity to assess reliably anticompetitive effect at that early juncture in an antitrust complaint. Weyerhaeuser, 665 F.2d 1072 (D.C. Cir. 1981). The court's foresight proved accurate. In a lengthy and thorough opinion, an FTC administrative law judge ruled against the FTC on all antitrust claims, holding that the Commission had "fail[ed] to establish that Weyerhaeuser's acquisition . . . may lessen competition or tend to create a monopoly, in any line of commerce in any section of the country. In re Weyerhaeuser Co., FTC Docket No. 9150, slip op. at 97 (Oct. 11, 1983).

51 Great Lakes Chem., 528 F. Supp. at 86 (citing Exxon, 636 F.2d at 1344).
were killed and full administrative hearings never took place.\textsuperscript{53} That a proposed merger can effectively be killed by a section 13(b) injunction when there has never been an adjudicative determination of anti-competitive effect belies a fundamental unfairness in section 13(b) procedures.\textsuperscript{54} This "killing" effect could be further aggravated by a relaxed standard of proof and FTC abuses of the section 13(b) power to enjoin acquisitions.

If congressional antitrust policy were to discourage industry growth by merger, the effects of section 13(b) injunctions would be of little concern, but this has never been the case.\textsuperscript{55} Mergers are an "important mechanism in the creation of social wealth"\textsuperscript{56} and many of the mergers which the FTC has opposed through section 13(b) have had prospective procompetitive and societal benefits.\textsuperscript{57} Where the injunction is issued, these


\textsuperscript{54} An analogy can be drawn to the procedural due process problems raised by the garnishment and replevin cases in the 1970's. In effect, the acquiring company's presumptively legitimate property interest in the acquired company is being "taken" without an adjudication of the merits of the underlying antitrust allegations which, if established, would be the only factor that could prevent consummation of the merger. See Leubsdorf, supra note 4, at 543-44; Pfunder, supra note 41, at 116; see generally North Georgia Finishing v. Di-Chem., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972).

\textsuperscript{55} The rationale behind allowing some mergers is stated by antitrust commentator Donald Turner:

Widespread prohibition of mergers would impose serious, if not intolerable, burdens upon owners of businesses who wished to liquidate their holdings for irreproachable personal reasons. . . . Moreover, economic welfare is significantly served by maintaining a good market for capital assets. By enhancing the value of assets when owners wish to sell, a strong capital assets market increases the rewards of successful entrepreneurial endeavor. In this way the possibility of mergers stimulates the formation and growth of new firms, though the extent of this effect is of course highly speculative. More importantly, a policy of free transferability of capital assets tends to put them in the hands of those who will use them to their utmost economic advantage, thus tending to maximize society's total output of goods and services.

Growth by merger, like internal growth, will often yield substantial economies of scale in production, research, distribution, cost of capital, and management. Entry by merger, like entry by new growth, may stimulate improved economic performance in an industry characterized by oligopolistic lethargy and inefficiency. Finally, acquisition of diversified lines of business, by stabilizing profits, may minimize the risks of business failure and bankruptcy.


\textsuperscript{56} R. Bork, supra note 55, at 199; see also G. Benston, Conglomerate Mergers 50 (1980).

\textsuperscript{57} Cf. FTC v. Food Town Stores, 539 F.2d 1339, 1346 (4th Cir. 1976) (court acknowledged that enjoined merger would have enabled "the buying public [to] purchase more economically at [the defendant's stores] than at . . . any of [the defendant's] other competitors."); FTC v. Lancaster Colony Corp., 434 F. Supp. 1088 (S.D.N.Y. 1977) (same). In FTC v. Weyerhaeuser
benefits were irretrievably lost. Considering that ultimate consumer welfare must be a primary goal of the antitrust laws, an interpretation of the section 13(b) statutory standard that permits these proconsumer benefits to be sacrificed to a preliminary and cursory determination of anticompetitive effect based on "an imperfect, incomplete and fragile" record is shortsighted.

Interpreting Section 13(b): Principles Applied

As prerequisites to requesting an injunction from the district court, the FTC must have reason to believe that the merger will violate the antitrust laws and that enjoining it would be in the public interest. Noting that the statutory standard for relief is also one of the "public interest," one commentator has argued that "[t]his redundancy raises a question about the need for a judicial determination of the issues." Judging from the statute's face, this concern is legitimate. In practice, however, the Commission itself has interpreted away any surface redundancy in section 13(b). The FTC has narrowly defined the "public interest," in the section 13(b) context, to mean only the effective enforcement of the antitrust laws. The two findings necessary before the FTC can seek the

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Co., 655 F. 2d 1072 (D.C. Cir. 1981), had the court enjoined the acquisition, society would have lost the "procompetitive benefits from construction of a new linerboard mill with attendant improvement in the area employment rate." Id. at 1088. In addition, "an almost certain increase in the supply of linerboard ... on the West Coast and the export would have been lost." Id. at 1075. Similarly, in FTC v. Great Lakes Chem. Corp., 528 F. Supp. 84 (N.D. Ill. 1981), enjoining the merger would have sacrificed the life of the acquired company, id. at 96-98, necessary research and development in the industry, benefits to the local community, and the promotion of foreign trade. Id. at 98. See also supra note 55.

Generally speaking, there exists a myriad of potential economic benefits from merger activity. All the financial economics studies indicate that "on average, value is increased by mergers and ... shareholders of acquired firms realize gains that are statistically significant." J. Weston, Industrial Concentration, Mergers and Growth, in 2 U.S. DEPT. OF COMMERCE, MERGERS AND ECONOMIC EFFICIENCY 62 (1981). These gains "provide both a check on and a stimulus to managerial performance." Id. Mergers also require that "asset reevaluations take place, thereby encouraging efficient allocation and movement of capital ...." 1 U.S. DEPT. OF COMMERCE, MERGERS AND ECONOMIC EFFICIENCY 4 (1980) (prefatory remarks by J. Fred Weston to a panel discussion of Weston's study, Industrial Concentration, Mergers and Growth, printed in 2 U.S. DEPT. OF COMMERCE, MERGERS AND ECONOMIC EFFICIENCY 4 (1981)). Conglomerate mergers "permit entry [into markets] in circumstances where de novo entry might be very difficult ...." Id. at 5. Mergers are also a "necessary part of the long-range planning process of firms in responding to market opportunities ...." Id. Finally, the diversification which mergers facilitate "reduce bankruptcy risk and bankruptcy losses." Id.

See R. BORK, supra note 55, at 7. Bork argues quite convincingly that "a consideration of the virtues appropriate to law as law demonstrates that the only legitimate goal of antitrust is the maximization of consumer welfare." (emphasis in original).


Kelley, supra note 11, at 16.

FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1081 (D.C. Cir. 1981) ("The Commission urges that there is no other equity to weigh here other than the one it advances—the public interest in effective antitrust enforcement.").
injunction under section 13(b) consequently merge through the following tautology: Where the FTC believes a merger will violate section 7, it necessarily believes that the law must be effectively enforced; effective enforcement means seeking the preliminary injunction; because the public interest in section 13(b) cases is served only by effective enforcement, the injunction, _ipso facto_, must be in the public interest. In effect, this means that the FTC will seek an injunction whenever it believes that a merger will violate section 7.

This dereliction of statutory duty by the FTC leaves the decision whether a preliminary injunction would truly be in the public interest to the courts. After the Commission has brought the suit, the operative language of the section 13(b) judicial standard requires the courts to decide whether a preliminary injunction would be in the public interest. This decision is to be based upon a consideration of the Commission's likelihood of ultimate success and a weighing of the equities. Following this analysis, a court _may_ issue an injunction.\(^{62}\)

Likelihood of Ultimate Success

The section 7 showing required before a court will issue a preliminary injunction has caught the attention of recent commentators\(^{63}\) and received a diverse treatment by the courts. No exact showing is specified in the statute. In fact, section 13(b) on its face requires only that courts "consider" the likelihood of ultimate success, and not that the FTC establish this likelihood to any particular degree.\(^{64}\) Nonetheless, some courts have come very close to requiring the FTC to prove the underlying section 7 allegation. In _FTC v. Great Lakes Chemical Corp._,\(^{65}\) the court held that the FTC has a "substantial burden" under section 13(b) and required the Commission to prove "'not that the merger in question may possibly have an anti-competitive effect, but rather that it will probably have such an effect.'"\(^{66}\) Similarly demanding versions of the section 13(b) likelihood of success requirement surfaced in _FTC v. Atlantic Richfield Co._\(^{67}\) and _FTC v. Tenneco, Inc._\(^{68}\) In each of these cases, the FTC failed to establish the requisite likelihood of success to allow the court to issue the injunction.\(^{69}\)

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\(^{62}\) See supra notes 18-18 and accompanying text.


\(^{64}\) See _supra_ note 2.


\(^{66}\) _Id._ at 86 (emphasis added), _citing_ United States v. Amsted Indus., 1972 Trade Cas. (CCH) ¶ 73,902, at 91,743 (N.D. Ill. 1972).

\(^{67}\) 549 F.2d 289 (4th Cir. 1977).


\(^{69}\) _Atlantic Richfield_, 549 F.2d at 300; _Tenneco_, 433 F. Supp. at 113.
Less strict showings of “likelihood” have been permitted in several cases. In *FTC v. Lancaster Colony Corp.*, the FTC needed to establish only “a fair and tenable chance” of ultimate success on the merits. A third standard, adopted from the context of private merger law, was applied in *FTC v. National Tea Co.* and *FTC v. Beatrice Foods Co.* Those courts were satisfied when the FTC raised “serious and substantial questions going to the merits.”

The proper interpretation of the likelihood of success requirement must be guided by the substantive and procedural context of section 13(b) litigation and the precise statutory language. The court in *FTC v. Lancaster Colony Corp.* displayed excellent insight into the court's role vis-à-vis the section 7 allegation in this sort of summary proceeding:

As a practical matter, a district court can hardly do more at so early a stage of antitrust litigation than to make a considered estimate of the FTC's apparent chances of success based upon what must necessarily be an imperfect, incomplete and fragile factual basis. It, therefore, seems clear that the Congress intended that in applications under Section 13(b), the district court be guided by preliminary and tentative findings of fact without attempting to resolve the underlying antitrust issues of fact.

Even after lengthy adjudicative hearings, determination of these underlying antitrust issues demands complex and time-consuming analysis. These complexities are amplified in the section 13(b) context, when a preemptive resolution may be based on as little as one day of trial, or on no trial at all. A black letter rule which establishes one particular degree of likelihood as the showing to be required subrogates the public interest

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*Id.* at 1090.

603 F.2d 694 (6th Cir. 1979).


National Tea, 603 F.2d at 698; Beatrice Foods, 587 F.2d at 1229. This “substantial and serious question” test derived from Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953), but received limited application until it was restored in Sonesta Int. Hotels Corp. v. Wellington Assoc., 483 F.2d 247 (2d Cir. 1973). *See Note, Merger Cases, supra note 63.*

The problems inherent in applying a legal standard which has developed in the private merger law context to government-sought injunctions are apparent. Private parties are motivated by an entirely different set of concerns when challenging an acquisition of their own company by an aggressive pursuer, and section 7 is often used as a tool to fend off an unwanted take-over bid. *See L. Sullivan, supra note 29, at 671-72 & n.9; see also Comment, supra note 7, at 257-68.*


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

See supra notes 47-49 and accompanying text.
to the underlying merits of the section 7 violation and undercuts the "independent judgment" courts are to exercise when considering the propriety of injunctive relief. Had Congress intended section 13(b) to become an abbreviated section 7 case, it could have easily written the statute to accomplish that end.

The better approach to the likelihood of success issue is found in the statutory command to "weigh... the equities and consider... the Commission's likelihood of ultimate success." That Congress expressly provided a double-edged analysis to determine whether the public interest would be served by preliminary relief should not be lightly regarded. The two-step directive suggests a sliding scale analysis. Where the equities strongly favor the FTC, the Commission's burden on the underlying substantive issues should be appropriately reduced. However, where public and private equities favor consummation of the transaction, the Commission should be required to make a substantial showing on the merits.

This sliding scale approach, though never expressed in such terms, is reflected in some of the case law. In FTC v. Food Town Stores, Inc., the court found the public equity favoring consummation of the merger too speculative to be accorded any weight in the section 13(b) calculus; the only equities which favored the transaction were the private harms to the parties should the acquisition be enjoined. Accordingly, the likelihood showing required of the FTC by the court was relatively light.

On the other hand, there were significant public and private equities which supported the proposed acquisition in FTC v. Great Lakes Chemical Corp. In that case, the court denied the Commission preliminary relief after

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79 Accord, Kelley, supra note 11, at 28-29 n.141.

80 This approach has never been suggested by the courts or commentators. However, the logic of the argument seems compelling. The court, realizing that its evaluation of the section 7 allegations can be hardly more than a "considered estimate," see FTC v. Lancaster Colony Corp., 434 F. Supp. at 1091, may initially focus upon the equities of particular case-factors which are susceptible of proof at this early state in the litigation. Then, depending upon the nature of those particular equities, the court may require more or less of a showing of "likelihood." An added benefit of this approach is that it forces the FTC to take a more focused attack in each § 13(b) case it would bring as opposed to its customary reliance upon the one broad equity behind which the Commission typically hides—the public interest in effective antitrust enforcement. See infra notes 89-93 and accompanying text.

81 539 F.2d 1339 (4th Cir. 1976).

82 Id. at 1345-46.

83 Id. at 1345.

84 Id. at 1344-45. See also FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1097 (S.D.N.Y. 1977).

holding that the government had not met a high standard of proof on the likelihood of success.\textsuperscript{66}

A sliding scale analysis accounts for the problematic nature of the underlying antitrust determinations required of the court in the section 13(b) context and is consistent with the statutory language which directs that after "considering the Commission's likelihood of ultimate success"\textsuperscript{67} a court may enjoin the merger. Furthermore, the approach serves two goals inherent in the public interest standard of section 13(b). First, it incorporates into section 13(b) analysis the independent judicial discretion envisioned by Congress. Second, and more importantly, the sliding scale directs judicial and analytical attention to what should be the proper and primary focus of section 13(b) litigation—a probing consideration of the equities.

WEIGHING THE EQUITIES: PUBLIC, PRIVATE, AND COLLATERAL

Although section 13(b) mandates a weighing of the equities in deciding whether an acquisition should be enjoined, the courts, perhaps unsurprisingly, have developed widely differing approaches to exactly what the statute requires them to weigh.\textsuperscript{68}

The FTC has asserted that section 13(b) demands a dichotomy between public and private equities and that private equities—harms to the merging parties and their stockholders—should "merit no or, at most, minimal weight" in the section 13(b) calculus.\textsuperscript{69} Instead, the Commission narrowly urges that the only proper equity for the court to weigh is the one the FTC itself advances—the public interest in effective antitrust enforcement.\textsuperscript{70} However, even the Commission does not dispute the fact

\textsuperscript{66} Id. at 86-87. See also United States v. Siemens Corp., 621 F.2d 499 (2d Cir. 1980). In that case, brought by the Justice Department rather than the FTC, the court held: Nor does proof of likelihood of success on the merits relieve a court of equity of duty to balance hardships, i.e., determine whether the harm to defendants outweighs the likelihood that adequate relief will be available to the Government if the merger is consummated . . . To be sure, once the Government has shown a reasonable likelihood of success on the merits, the equities will usually tip in its favor, since private interests must be subordinated to public ones, but surely where the harm to defendants is great and there is little likelihood that consummation of the merger would jeopardize ultimate relief, the court clearly may deny injunctive relief or fashion prophylactic measures to obviate the threat of harm.

\textsuperscript{67} 15 U.S.C. § 53(b) (1982) (emphasis added). Note also that this approach, in that it requires the court to weigh the equities before it moves on to a consideration of the merits, is consistent with the order of analysis implied by the language of the statute.

\textsuperscript{68} Compare FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1081-83, 1089-91 (D.C. Cir. 1981)

\textsuperscript{69} with FTC v. Food Town Stores, 539 F.2d 1339, 1345-46 (4th Cir. 1976).


\textsuperscript{70} Id. at 1081. A close look at this statement illustrates a further inconsistency in the Commission's position. The obvious roots of the "single equity" argument lie in the presumed
that proposed mergers often benefit the public and that enjoining them can cause public harm. According to the Commission, however, consideration of these public harms and benefits is precluded by the statute "unless they relate to the relevant market" and could form part of a defense to the Commission's antitrust complaint. Public harms and benefits—those unrelated to the relevant market—may be called collateral equities and, the FTC argues, are irrelevant in a section 13(b) case.

The FTC's interpretation of the equity analysis required by section 13(b) has found acceptance in certain courts. The district court in FTC v. Food Town Stores, Inc., found that the defendants would be substantially harmed by interim injunctive relief and enumerated seven potential effects of a preliminary injunction blocking the merger. On appeal, the Fourth Circuit noted that all of these harmful effects went "to the private injury which [might] result from an injunction delaying the merger" and held that private harms "are of such a nature that they are not proper

inadequacies of divestiture as an effective remedy following consummation of a merger. The inadequacy of divestiture, however, is an equity of which courts, in § 13(b) cases, typically take account. See, e.g., FTC v. Exxon Corp., 636 F.2d 1336, 1344 (D.C. Cir. 1980). By the Commission's own argument then, should divestiture be an adequate remedy, no injunction should issue preventing the merger. The Commission clearly does not support this position even though it is the natural extension of its own argument.

Weyerhaeuser, 665 F.2d at 1082-83.

Id. at 1082.

The Commission's argument relies on an oft-quoted passage from United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), in which Justice Brennan, speaking for a divided court, stated:

We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

Id. at 371 (emphasis added). The FTC's reliance on this case for the proposition that the only equity to be weighed is the public interest in effective antitrust enforcement is misguided. Philadelphia National Bank was a § 7 case and its relevance to § 13(b) analysis is limited. Section 7 forbids all anticompetitive mergers; it makes no provision for any sort of balancing between the competing interests. To apply Brennan's § 7 analysis to a § 13(b) injunction case, where Congress has explicitly directed the courts to "weigh ... the equities" and consider the public interest is plainly wrong.

539 F.2d 1339 (4th Cir. 1976) (district court case discussed on appeal)

Id. at 1345.

These included: subjecting the acquired party to lawsuits by creditors and stockholders; requiring Food Town Stores to file new registration statements with the Securities and Exchange Commission; adversely affecting the market value of Food Town Stores' stock; subjecting the acquired party to a potential loss of personnel at its home office and warehouses; requiring the acquired company to try to arrange substantial new financing on very short notice; and requiring the solicitation of new proxies before the stockholders' meeting. Id.

Id. at 1346 (emphasis in original).
considerations for granting or withholding injunctive relief under § 13(b)."98 The rationale behind the court's decision was a much criticized interpretation of the statute,99 but Food Town Stores has been followed in other decisions.100

The practical effect of rulings like Food Town Stores and of the FTC's reading of section 13(b) has been a radical simplification of the judicial analysis required in section 13(b) cases. When a court follows these rules, once the Commission shows a likelihood of ultimate success and a prospect of interim harm should the merger go unchecked, a preliminary injunction blocking the acquisition "should issue without further ado."101 The better reasoned analysis considers the full range of public and private equities when determining whether a preliminary injunction would actually be in the public interest.

Support for Considering the Full Range of Equities

Support for considering the full range of public and private harms in a section 13(b) hearing is found in the statute, its legislative history, and case law applications. As originally proposed, section 13(b) would have permitted the district court to enjoin an acquisition upon "a proper showing that such action would be in the public interest."102 The court was not required to weigh the equities or consider the Commission's likelihood of ultimate success.103 That the final version of section 13(b) passed with express reference to the equities should not be "brushed aside as essentially repetitive or meaningless."104 The short reference to the statute in the conference report adds further support to this argument.105 In enacting section 13(b), Congress intended

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98 Id.
99 One commentator provides a representative sample of the criticism directed at this portion of the decision. Kelley, supra note 11, at 29-32.
103 This language was added in conference. H. CONF. REP. No. 624, supra note 13, at 31, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2523, 2533. It is interesting, though perhaps not surprising, that the FTC's construction of § 13(b), in that it reads out private equities altogether and all public equities except the effective enforcement of antitrust law, would be exactly right—if the original bill had passed. Apparently, the Commission did not always construe the § 13(b) equities in such a narrow fashion. A former Director of the FTC's Bureau of Competition had this to say about the § 13(b) command to the equities: "What it seems to mean . . . is that the district court may weigh the injury that would result to the public or competition if an injunction is not granted against any injury that would be incurred by the defendant or others if the injunction is granted." Halverson, supra note 11, at 881.
to codify the standards which courts were already applying to government requests for preliminary injunctions in merger cases.\footnote{Id.} These earlier cases had established that equitable considerations must be taken into account regardless of whether they could either be asserted as defenses to the section 7 allegations or “relate to the relevant market.”\footnote{See, e.g., FTC v. PepsiCo., 477 F.2d 24, 30 (2d Cir. 1973) (“We must balance the equities when a supplicant seeks injunctive relief.”); United States v. Heileman Brewing Co., 345 F. Supp. 117, 121 (E.D. Mich. 1972); United States v. ITT, 306 F. Supp. 766, 797 n.95 (D. Conn. 1969) (“a "balancing of the equities . . . is a relevant factor . . . in deciding whether to deny or grant injunctive relief").} In addition to signaling congressional intent to codify the decisional law, the report also defines the judicial role in a section 13(b) case to include the exercise of independent judgment.\footnote{H. CONF. REP. No. 624, supra note 13, at 31, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2523, 2533.} This independent judgment would be lost if courts followed \textit{FTC v. Food Town Stores, Inc.}\footnote{539 F.2d 1339 (4th Cir. 1976), vacated as moot, 547 F.2d 247 (4th Cir. 1977).} or the FTC’s self-serving interpretation of what section 13(b) requires. As the court so aptly recognized in \textit{FTC v. Weyerhaeuser}: “independent judgment is not exercised when a court responds automatically to the agency’s threshold showings [on the merits]. To exercise such judgment, the court must take genuine account of the ‘equities.’”\footnote{Weyerhaeuser, 665 F.2d at 1082.} The independent judgment would be lost if courts followed \textit{FTC v. Food Town Stores, Inc.}\footnote{Id. at 1083 (emphasis added). See also FTC v. Simeon Management Corp., 532 F.2d 708, 717 (9th Cir. 1976).}

The most substantial support for fully considering public and private equities at the section 13(b) stage of an antitrust complaint is found in two recent opinions. The courts in \textit{FTC v. Great Lakes Chemical Corp.}\footnote{528 F. Supp. 84 (N.D. Ill. 1981).} and \textit{FTC v. Weyerhaeuser Co.}\footnote{665 F.2d 1072 (D.C. Cir. 1981).} perceived the equitable analysis required by 13(b) in its proper form: those courts balanced alongside the public interest in a competitive economy, the “potential benefits, public and private, that may [have been] lost” had the injunction issued.\footnote{Id. at 1083 (emphasis added). See also FTC v. Simeon Management Corp., 532 F.2d 708, 717 (9th Cir. 1976).} It is this analysis, not that of \textit{FTC v. Food Town Stores, Inc.}, or of the FTC, which should guide courts addressing the propriety of section 13(b) injunctive relief.

### Public Equities

Public equities break down into two groups: those which favor consummation of the merger and those which support enjoining the transaction. The former are collateral equities which represent the expected benefits to the public at large. The latter, argued by the Commission of course, are the same in every case and implicate the public interest in preserving a competitive market pending administrative adjudication of the
underlying merits. This interest subsumes two parallel, if not equivalent, concerns: the need for effective enforcement of the antitrust laws and the inadequacy of divestiture as an ultimate remedy. These important concerns gain additional weight when the Commission has made a showing of likelihood of success. It is at this point in the analysis that the FTC would have the courts stop and issue the injunction regardless of the public and private effect of enjoining an acquisition. It is at precisely this point, however, that the Weyerhaeuser court refused to stop.

In Weyerhaeuser, the FTC sued to enjoin a merger between the defendant and Menasha Corporation. Before the merger, Weyerhaeuser was the largest producer of corrugated containers in the United States and the seventh largest producer of corrugating medium, a component of the containers, on the West Coast. Menasha, a privately held family corporation, was the third largest producer of corrugating medium on the West Coast. The merger "would place Weyerhaeuser in the lead position among West Coast medium producers."

Through the merger Weyerhaeuser would have acquired several assets but the FTC challenged only the acquisition of a corrugating medium mill. Acquisition of this mill, the Commission argued, would "eliminate Menasha as a competitor in an already concentrated West Coast corrugating medium market, significantly increase concentration in that market and increase" the possibility of collusive pricing among the remaining producers. The district court denied the preliminary injunction even though it found that the FTC had established a likelihood of success on the merits. Instead, a hold separate order was entered to prevent interim anticompetitive harm.

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114 Weyerhaeuser, 665 F.2d at 1083.
115 See supra note 42.
116 Weyerhaeuser, 665 F.2d at 1081.
117 The Weyerhaeuser court ultimately held that:

"It is permissible for the court to weigh among "the equities" the potential benefits, public and private, that may be lost by a merger blocking preliminary injunction, whether or not those benefits could be asserted defensively in a proceeding for permanent relief. We do not believe that the district court, mindful that its "likelihood of success" evaluation is only a forecast, should be precluded from taking into account the costs entailed should its prediction prove erroneous."

Id. at 1083.
118 Id. at 1074.
119 Id.
120 Id.
121 Id.
122 Id.
124 Id. at 76,049. A hold separate order is a form of preliminary injunction which allows the challenged merger to go forward but demands that the acquired company and its assets be maintained as an independent operating entity pending resolution of the full administrative hearing. The purpose of this type of order is to preserve the acquired company as a separate and viable competitor until the merger's legality is determined and to prevent a commingling
lower court held that eventual divestiture would be an adequate remedy and prevent long-run competitive harm should "the FTC succeed ... in its administrative complaint." In light of the purpose of section 13(b),
of the merging companies' assets so that the acquired company may be promptly and effecti-
vely divested should the FTC ultimately prevail. The authority upon which a hold separate
order is entered is traditionally based upon the "inherent equitable powers" of the court. See United States v. United Technologies Corp., 466 F. Supp. 196, 200 (N.D.N.Y. 1979). Recent courts, however, have found this authority in § 13(b) or in the "inherent powers." See, e.g., FTC v. Exxon Corp., 1979-2 Trade Cas. (CCH) ¶ 62,972, at 79,539 (D.D.C. 1979), aff'd, 636 F.2d 1336 (D.C. Cir. 1980). While dissenting Judge Mikva in Weyerhaeuser and the FTC both argued that § 13(b) empowers the court to issue only a full stop order or no order at all, there seems to be "seant sense in [making] this distinction." FTC v. Weyerhaeuser Co., 665 F.2d at 1084 (majority opinion). The power to issue preliminary relief in the form of a hold separate order was established in the very first government attempt to enjoin a merger. United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959), aff'd, 370 U.S. 294 (1963).

There are two legitimate criticisms of the use of a hold separate decree. The first, argued
by the FTC and Kelley, supra note 11, at 28-30, asserts that the sort of comprehensive and supervisory order necessary to maintain the acquired company as a separate and viable competitor forces the court into an improper exercise of article III judicial power by requiring the court to, in effect, run the business. The short answer to this lies in the far-reaching remedial powers of the judiciary; courts do this sort of thing all the time. By statute or in equity, courts have regularly taken an active role in what is traditionally nonjudicial business. For instance, under the bankruptcy laws, a court has the authority to appoint an interim trustee in certain circumstances. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 303(g), 701 (1982). In Chapter 11 business reorganization cases, and in Chapter 13 individual reorganization cases, courts oversee the protection of the creditors' and equity security holders' rights, 11 U.S.C. §§ 1104(a), 1108, 1302. The enforcement of contracts by specific enforcement is another example. See 5A A. CORBIN, CORBIN ON CONTRACTS § 171 (1964). Additionally, courts have become integrally involved with the political processes in the voting rights and prisoners' rights cases, and in Boston's school desegregation problem, where the federal court in effect ran the city's school board. See United States v. Manning, 215 F. Supp. 272 (W.D. La. 1963); see also Prison Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff'd, 530 F.2d 401 (1st Cir.), cert. denied, 426 U.S. 935 (1976). Considering these cases, limited judicial intervention occasioned by implementation of a hold separate order is hardly objectionable.

The second criticism is aimed at the real ability, in any case, of a hold separate order to protect against interim competitive harm and to preserve the adequacy of eventual divestiture. See, e.g., L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 670-71, 673 (1977) ("courts should not lightly assume that [hold separate orders] are adequate to assure that the merger can later be effectively undone"); see also Note, "Preliminary Preliminary Relief Against Anticompetitive Mergers, 82 YALE L.J. 155, 165 (1972). This overgeneralized concern ignores the fact that the FTC has put its own stamp of approval on the adequacy of this sort of preliminary relief. See, e.g., FTC v. Exxon Corp., 636 F.2d 1336, 1344 (D.C. Cir. 1980); FTC v. Pillsbury Co., 1976-2 Trade Cas. (CCH) ¶ 61,200, at 70,470 (N.D. Ill. 1976); A.G. Spaulding & Bros., 56 F.T.C. 1125, 1126 (1960). It also ignores the fact that a court will not issue a hold separate order in lieu of a full stop decree where the former will not adequately protect all the interests involved. This is also appealing decision and, as the court of appeals in Weyerhaeuser explained, a

hold separate order ... should not issue absent careful review of the partic-
ticular features of the proposed merger and a reasoned determination from the evidence that the milder restraint will operate as an adequate preservative impeding interim harm, and safeguarding eventual divestiture and in
view of the equities entailed, genuinely serve the public interest.

Weyerhaeuser, 665 F.2d at 1087.

Hold separate orders have been issued in the following merger cases: Weyerhaeuser, 665 F.2d 1072; Ohio-Sealy Mattress Mfg. Co. v. Duncan, 486 F. Supp. 1047 (N.D. Ill. 1980); United States v. United Technologies Corp., 466 F. Supp. 196 (N.D.N.Y. 1979); United States
this fact should weigh heavily against granting the requested injunction. The court went further, however, and found that there were other public benefits that would "support less drastic interim relief." It identified the increase of "linerboard supply on the West Coast, and for export" and the "increase . . . [of] employment in the North Bend area" as public benefits resulting from and favoring the merger. On appeal, the FTC argued that these public equities "do not count" because they neither relate to the relevant market nor could they be asserted as defenses to the alleged antitrust violations. This argument, however, was summarily rejected by the court of appeals which held that a court should weigh among the equities the potential public benefits that might be lost "by a merger-blocking preliminary injunction, whether or not those benefits could be asserted defensively in a proceeding for permanent relief.

The court in FTC v. Great Lakes Chemical Corp. also recognized the propriety of balancing against the public interest in preserving a competitive economy, the public, albeit collateral, benefits of the merger. The case involved a proposed merger between the Great Lakes Chemical Corporation and Vesicol Chemical Corporation. Great Lakes is an integrated producer of elemental bromine and bromine derivatives, and an aggressive national marketer of brominated flame retardants. Vesicol, whose principal business is the production of agricultural pesticides, became a producer of elemental bromine and bromine derivatives in 1976. The challenged transaction was Great Lakes' acquisition of Vesicol's bromine fields and bromine-related receivables. At the time of the section 13(b) hearing, Vesicol's El Dorado plant was temporarily shut down and the Michigan facility was conducting only minimal research.
The court denied the Commission preliminary relief. It acknowledged at the outset that the FTC "must show that the equities favor enjoining the transaction" and that "public equities such as increased exports and benefits to local communities . . . can lead to denial of preliminary relief . . . ."\textsuperscript{135} The court went on to enumerate several public equities which favored consummation of the proposed transaction.\textsuperscript{136} Noting that the stimulation of additional international activity is procompetitive and beneficial,\textsuperscript{137} it found that the merger would serve the national interest by promoting foreign trade.\textsuperscript{138} The court also found that allowing the proposed acquisition would encourage entry into the bromine and other high-risk industries by clearly indicating that a potential entrant would not be stuck in an industry by an FTC no-exit policy if the "ship starts to sink."\textsuperscript{139} Finally, the court ruled that the acquisition will "enhance critically needed research and development in the industry" and "benefit the local community of El Dorado, Arkansas."\textsuperscript{140} These public benefits, in conjunction with significant private equities\textsuperscript{141} and the fact that "divestiture would be an effective ultimate remedy" in this case,\textsuperscript{142} justified the court's ruling that "competition would be improved, not lessened" by the merger.\textsuperscript{143}

Private Equities

Private equities are those harms and benefits to the merging parties and their shareholders which may result from the court's decision to grant or deny the preliminary injunction. The role of private equities is appropriately less pronounced than that of the collateral, public equities. The FTC has argued that private equities merit no consideration in section 13(b) analysis and this position was adopted in FTC v. Food Town Stores.\textsuperscript{136} Great Lakes Chemical, 528 F. Supp. at 86-87.

\textsuperscript{135} Great Lakes Chemical, 528 F. Supp. at 86-87.

\textsuperscript{136} Id. at 98-99.

\textsuperscript{137} Id. at 98 (citing United States v. Standard Oil Co., 47 F.2d 288, 301 (E.D. Mo. 1931); United States v. Tidewater Marine Serv., Inc., 284 F. Supp. 324, 342-43 (E.D. La. 1968); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133, 195-96 (N.D. Cal. 1967)).

\textsuperscript{138} Great Lakes Chemical, 528 F. Supp. at 98.

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Id.

\textsuperscript{142} Id. at 99.

\textsuperscript{143} A different sort of public equity was found to be controlling in FTC v. Exxon Corp., 1979-2 Trade Cas. (CCH) ¶ 62,972, at 78,392. There the court, exercising the sound discretion vested in it by § 13(b), ruled that the "public interest [lay] in this instance in the development and distribution of improved electrical equipment . . . in the midst of the present energy crisis . . . with maximum efficiency and with significant savings in energy."
and FTC v. Lancaster Colony Corp. This narrow view, as earlier illustrated, proves too much. The court of appeals in Weyerhaeuser articulated the precise role that private harms and benefits to the merging parties and their stockholders should play in section 13(b) litigation:

[P]rivate equities merit consideration, although, standing alone, they do not override an FTC likelihood of success showing . . . . Prior to the enactment of Section 13(b), courts weighed private equities in the balance in cases in which preliminary injunctive relief was sought . . . . Since Congress intended to codify that case law, we have no warrant to drop private equities from the calculus. However, we agree with the Commission to this extent. Private equities do not outweigh effective enforcement of antitrust laws.1

Private equities go beyond mere expectations of financial gain from consummation of the merger. The lower court in Weyerhaeuser found that the merger would result in a competitive revitalization of Menasha and allow the firm to continue in the paper business on a more centralized basis. In turn, this would improve economic efficiencies. The acquisition would also provide Menasha and its shareholders with a solution to the liquidity problems which had plagued them throughout the years and which, absent the merger, “will worsen in the near future.” In FTC v. Great Lakes Chemical Corp., the analysis was “permeated by the non-competitive conditions of Vesicol's bromine-related operations” and this was the key factor in the court's decision. The court concluded that even if the FTC established a likelihood of success, “the debilitating condition of Vesicol's bromine operations [would be] an important equity to be considered because a preliminary injunction would exacerbate Vesicol's problems even though the [section 13(b)] hearing involved only a tentative assessment [of the antitrust allegations].” More specifically, the court ruled that the acquisition would give Vesicol's shareholders a chance to salvage something from the company's unsuccessful bromine operations and would give the company an “opportunity to escape its dire financial straits.” This latter equity, according to the court, “favors denial of the preliminary injunction . . . and was found to be controlling in United States v. G. Heileman Brewing Co. . . .”

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146 Id. at 1083 n.26.
147 FTC v. Weyerhaeuser Co., 1981-1 Trade Cas. (CCH) ¶ 64,263, at 76,048.
148 Id.
149 Id. at 76,047.
151 Id.
152 Id. at 98. This same sort of failing financial condition was controlling in the court's denial of preliminary relief in FTC v. National Tea Co., 603 F.2d 694, 698-99 (6th Cir. 1979).
Application of the Full Range of Equities

The private and public equities which the courts considered in *FTC v. Great Lakes Chemical Corp.* and *FTC v. Weyerhaeuser Co.* are primarily financial and economic efficiency costs and benefits which may result from consummation of the merger, as well as such public benefits as increased employment and production supply. While an anticompetitive merger is not saved at the section 7 trial because it may be beneficial "on some ultimate reckoning of social and economic debits and credits," a district or appellate court, mindful that its determination on the merits is only a prediction, must not "be precluded from taking into account the costs entailed should its prediction prove erroneous." The restrictive approach to the equities taken by the FTC and several courts refuses to recognize a section 13(b) hearing for what it is—the point at which a court must decide whether or not a preliminary injunction would really be in the public interest—and strips the courts of the ability to exercise the sort of independent judgment expressly required by section 13(b). The wide-ranging inquiry into the equities found in *Weyerhaeuser* and *Great Lakes Chemical* forces the Commission to definitively and legitimately establish that a preliminary injunction would be in the public interest. It recognizes that not all mergers are bad and that most can have significant benefits.

A full consideration of the public, private, and collateral equities is essential to developing a proconsumer premerger enforcement policy. This analysis captures the controlling message of section 13(b)—the need to preserve and order effective, ultimate relief—and delegates to a subordinate role any reliance on the underlying section 7 allegations. If postmerger divestiture is shown to be an adequate remedy, the court should rarely issue an injunction blocking a merger unless the section 7 violations are so obvious that there is little doubt about the resolution of the administrative hearing. Where the FTC shows that postmerger divestiture inadequately protects the public from potential anticompetitive effects should the merger be found to violate section 7, the court should permit consummation of the merger under a hold separate order or, in the worst case, enjoin the transaction altogether. The precise remedy applied by the court must depend completely on the precise facts and equities of each case. Where collateral equities, that is, public benefits not related to the relevant market, cannot be established to a reasonably certain degree by the acquiring company, the court should enjoin the merger. However, where the proposed merger offers benefits to the con-

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157 See supra note 124.
sumer public, by improving economic efficiency, reallocating inefficient productive factors, or increasing supply and employment opportunities, then even though postmerger divestiture may not be an adequate remedy, a full stop order enjoining the merger should not issue. The public can be protected from interim competitive harm by a hold separate decree.

CONCLUSION

Section 13(b) has been too narrowly construed by the FTC and by several of the courts directed to apply the law. Their interpretation of the statute, by deleting any meaningful consideration of the equities, has sacrificed the use of judicial discretion contemplated by Congress and reduced the judicial role to a mere rubber stamp on Commission requests for preliminary relief.

Proper analysis under section 13(b) must fully consider the real effects, both public and private, of the challenged transaction, bearing in mind that section 13(b) was enacted to preserve the ability of the FTC and the courts to order effective ultimate relief upon completion of proceedings on the merits. A mere showing of likelihood of success based on the minimal record developed in a section 13(b) hearing should not be enough to merit the issuance of a preliminary injunction blocking a merger. Courts must examine whether the proposed merger will increase production efficiencies or result in other economies of scale to the ultimate benefit of the consumer. Harms and benefits to the companies and their shareholders should also be considered, as well as general procompetitive effects on market structure. Finally, a section 13(b) court must assess collateral equities such as increased employment opportunities and other community benefits, increased domestic supply and exports, improved technologies, and energy conservation. This approach does not necessarily mean that more mergers will survive the preliminary injunction stage although such a result may be desirable. Adoption of this approach means only that the FTC must adjust its litigation strategy to conform with the language of the statute, congressional design, and the practicalities of section 13(b).

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