Antitrust, Vol. 35, No. 3, Summer 2021.

Recent Private Merger Challenges: Anomaly or Harbinger?

BY KEVIN HAHM, RYAN PHAIR, CARTER SIMPSON, AND JACK MARTIN

THE "CONVENTIONAL WISDOM" IN the antitrust bar holds that "private merger suits are unlikely to stop a merger."[1] Moreover, because of the major role played in merger enforcement by federal and state government actors, "the typical attorney client dialogue about M&A antitrust risks only rarely focuses on the possibility of private legal actions."[2] Recent developments have, if not changed this view, at least caused antitrust practitioners to pay more attention to private merger challenges. For example, a widely watched Fourth Circuit case recently characterized a successful private merger challenge as a "poster child for [post-closing] divestiture,"[3] and the above quotes about the rarity of private challenges come from a 2012 article in this Magazine urging practitioners to pay them greater attention.[4]

In the authors' view, private merger challenges were intended from day one—that is October 15, 1914, the date of passage of the Clayton Act—to be an integral part of the merger enforcement scheme. Whether they have, as a practical matter, been rarely successful is perhaps in the eye of the beholder. One success took place in 1987, when a private party filed a post-merger challenge to a deal that had been reported under the Hart-Scott-Rodino Act (HSR) to both the Federal Trade Commission and the Antitrust Division of the Department of Justice, and for which the statutory waiting period had expired. The challenger obtained extensive discovery, and after a full evidentiary hearing obtained a "hold separate" order.[5]

Regardless of how private merger enforcement has been characterized in the past, the reality is that the number of private enforcement actions has increased and will likely continue to grow. This comes at a time when the resources of federal and state enforcement agencies appear to be stretched to the limit by budgets that are not keeping pace with the increasing cost and number of merger challenges. As a result, practitioners should be aware of the increased likelihood of a private merger challenge to prospective transactions that may not be coextensive with federal or state enforcement.

Kevin Hahm, Ryan Phair, Jack Martin, and Carter Simpson are partners in the Antitrust Practice in the Washington, DC and Richmond, VA offices of Hunton Andrews Kurth LLP. All four served as trial counsel for Food Lion in Food Lion v. DFA. *Jack Martin also served as trial counsel for Steves in* Steves v. Jeld-Wen.

The Statutory Importance of "Private Attorneys General"

In terms of statutory language, private enforcement has been a cornerstone of the antitrust laws in general, and merger enforcement specifically, ever since the Clayton Act was passed. Indeed, it is no accident that the same statute, the 1914 Clayton Act, created not only Section 7, the substantive law making illegal any merger which "substantially . . . lessen[s] competition" but also a new government agency to enforce it, the FTC, as well as a veritable army of "private attorneys general."

The year 1914 was one of the few times in American history (today included) when antitrust issues were at the forefront of American life. President Wilson won the election of 1912 on a platform that placed antitrust reform front and center. Before that platform came to fruition in the Clayton Act, mergers were subject to challenge only to the extent the DOJ could characterize a transaction as either restraining trade or amounting to conduct that monopolized a market in violation of the 1890 Sherman Act. Merger enforcement under this regime was regarded as inadequate both in terms of the extent of the legal prohibition and in terms of limited enforcement by the DOJ's exercise of prosecutorial discretion, which could be influenced by political pressure.

In response, Congress enacted the Clayton Act, which expanded merger control by specifically targeting mergers and augmenting enforcement both through an "independent agency"—the FTC—and private parties. The latter were empowered to "have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws," including the merger provisions of Section 7,[6] language that is virtually the same as that authorizing the DOJ to file suit "praying that [a violation of the antitrust laws] shall be enjoined or otherwise prohibited."[7]

Thus empowered, private parties were by no means viewed as second-class enforcers; rather, they were to act as "private attorneys general" thereby "'opening the door of justice' to individuals harmed by antitrust violations while at the same time penalizing antitrust violators."[8] As the Supreme Court noted in *Reiter v. Sonotone Corp.*, "These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."[9]

Yet despite this clear statutory language, private parties historically have not filed anywhere near the same number of merger challenges as have the two government agencies. One potential reason may be the Supreme Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[10] and *Cargill, Inc. v. Monfort of Colorado, Inc.*,[11] which denied standing to horizontal competitors complaining about impairment from potential procompetitive effects of a merger. However, while these decisions barred a class of potentially disaffected private plaintiffs from bringing claims against merging parties, they did not prevent competitors from bringing claims related to *anticompetitive* effects of mergers. As discussed in greater detail below, claims by competitors related to anticompetitive effects from a merger—particularly in the context of foreclosure—now appear to be on the rise.

In the press, in defense briefs, and even in dicta in judicial opinions, one often sees a reference to the government's decision not to challenge a merger as an "approval" of that merger, as if the government had the last word and there were no private enforcement.[12] Of course, there is in fact no procedure for the government to "approve" a merger, and the government's failure to challenge a merger in advance of the expiration of the HSR waiting period, or at any time, does not prevent a private party from filing its own suit. Indeed, the purpose of HSR is simply to inform the government of mergers before they happen for the sensible reason that if the government wants to challenge them, the most logical time to do so is prior to consummation. That said, the government can and does file post-closing challenges, in one famous case doing so 30 years after the fact,[13] and within the last few months seeking to unwind Facebook acquisitions that previously were "cleared" in the HSR process.[14]

Private Enforcement May Become More Prominent

Private merger enforcement may become more prominent if the federal antitrust agencies leave a gap due to limited resources or prosecutorial discretion. Several commentators have noted that resources for the DOJ and FTC are limited and in need of substantial increases. A report by the Washington Center for Equitable Growth found that appropriations for the antitrust agencies in 2018 were 18 percent lower than in 2010 and that the agencies had slightly fewer resources in 2018 than they had in 2001.[15] In testimony at the Antitrust Subcommittee's hearing on Proposals to Strengthen the Antitrust Laws and Restore Competition Online, former Assistant Attorney General Bill Baer reported that the DOJ ended fiscal year 2019 with just 594 employees compared to 795 employees 10 years earlier.[16] The FTC had roughly the same number of employees in FY 2019 as it did ten years earlier.[17] In contrast, Gross Domestic Product has increased 37 percent from 2010 to 2018,[18] and HSR merger filings increased by 81 percent from FY 2010 to FY 2018.[19] While HSR merger filings have increased, the number of Second Requests and merger challenges have not changed significantly during the same period.[20]

Do these statistics for declining resources, increased HSR filings, and a stable number of merger challenges suggest that merger enforcement by the federal antitrust agencies might have been higher but for limited resources? Perhaps. Other explanations include a shift of enforcement policy, or simply that the number of procompetitive (or competitively benign) transactions increased during the period while the number anticompetitive mergers remained constant. Nevertheless, the possibility that limited resources have led to under-enforcement cannot be excluded.

Although Congress increased the FTC's budget by $20 million[21] and the DOJ's budget by $17.8 million for FY 2021,[22] these modest increases may not be sufficient to meet the agencies' needs for their merger enforcement programs. Litigating modern merger challenges is extremely resource intensive. For instance, in 2016, the DOJ successfully challenged two proposed mergers in the health insurance industry (*Anthem/Cigna*[23] and *Aetna/Humana*[24]), and those two matters alone required 25–30 percent of the Division's professional staff.[25] In the same year, the FTC litigated four merger challenges (*Cabell/St. Mary's*,[26] *Staples/Office Depot*,[27] *Hershey/Pinnacle*,[28] and *Advocate/Northshore*[29]). According to Baer, that "inevitably meant other matters were understaffed."[30]

Moreover, merger enforcement is only one part of the agencies' missions. Putting aside the authorities of the DOJ and FTC over criminal antitrust and consumer protection, respectively, both agencies are also charged with civil nonmerger antitrust enforcement, and are in the midst of litigating landmark cases against Google[31] and Facebook.[32] The Google trial will not occur until 2023,[33] and both cases have been compared to the DOJ's resource-intensive 2001 case against Microsoft.[34] The Texas Attorney General's request for appropriations in connection with its case against Google highlights the significant resources needed to litigate these types of cases. As lead for a group of states in a separate antitrust suit against Google, the Texas AG requested $43 million for expert witness expenses, to which the chair of the Texas Senate Finance Committee responded that she was "doubtful" the amount would be sufficient.[35]

Other cases and programs will also undoubtedly drain the agencies' resources. Both agencies continue to investigate, and may bring enforcement actions against, the other two major technology platforms: Apple and Amazon.[36] Furthermore, the FTC is currently undertaking several competition-related 6(b) studies, including: a Certificate of Public

Advantage (COPA) study;[37] a study on prior acquisitions by large technology companies;[38] and a retrospective of physician acquisitions.[39] While most of these studies are largely undertaken by FTC economists, these are the same staff economists needed for the bread-and-butter work of FTC staff during ongoing merger investigations and enforcement actions.

State AGs have no doubt become more active in antitrust enforcement and have sought independent enforcement actions apart from their federal counterparts. For instance, the California and Washington AGs brought antitrust suits against *Sutter Health*[40] and *CHI/Franciscan*,[41] and a coalition of ten states sought to block the merger of *T-Mobile/Sprint* entirely after the DOJ and the FCC had settled the case with conditions.[42] Nevertheless, state AG resources are also limited. While some state AG offices such as New York may have as many as a dozen antitrust lawyers, many states only have one (or no) antitrust lawyer.[43]

The federal antitrust agencies frequently decline to challenge a merger based on prosecutorial discretion. In addition to resources, prosecutorial discretion may factor in policy considerations (e.g., the likelihood of deterrence) and assessment of litigation risk. For instance, the DOJ's case against *AT&T/Time Warner* showed the difficulty in successfully challenging vertical mergers.[44] Subsequently, in the *United/DaVita* matter, the FTC sought enforcement action in Nevada, a market that raised both horizontal and vertical competitive concerns.[45] However, the FTC declined to challenge the merger in Colorado, a market that presented only vertical issues, with two of the commissioners citing litigation risk as a reason for not seeking enforcement action.[46] Notwithstanding the FTC's decision, the Colorado AG obtained a consent decree to settle its allegation that the vertical merger in Colorado was anticompetitive.[47] In *DFA/Dean*, the DOJ obtained a consent decree that addressed markets presenting only horizontal overlaps.[48] While the DOJ (and North and South Carolinas AGs) declined to pursue enforcement action in North and South Carolina—a market that presented vertical-only issues—private plaintiffs challenged the merger, and the litigation was subsequently settled.[49]

Both *United/DaVita* and *DFA/Dean* are instances in which the federal antitrust agency declined to take action against a vertical merger, [50] but that did not foreclose a state AG or private plaintiffs from pursuing relief.

Private Merger Challenges to Date

Whether or not government enforcement of Section 7 has been limited due to lack of resources, it appears that private merger challenges are on the rise. By our count, there have been 35 private merger challenge cases filed since 2015 compared to 19 such cases filed the previous five years (from 2010 to 2014).[51] Moreover, ten of the recent complaints were filed since 2020 alone. Several recent private merger challenges appear to have proved "successful" from a review of the public record. Those cases provide valuable lessons about competitor standing to seek injunctive relief, the availability of divestiture as a remedy, the risk of post-closing challenges, and the importance of foreclosure as a theory of harm.

A number of private merger challenges filed by competitors since 1985 were able to overcome the standing requirement that stymies many private plaintiffs in antitrust damages cases. The Supreme Court laid out the standing requirement for private plaintiffs in *Brunswick* [52] and *Cargill*.[53] In those cases, competitors were barred from seeking damages under Section 4[54] and injunctive relief under Section 16.[55] Courts have noted that the standard for injunctive relief is lower than that for damages.[56] Competitor challenges since 2000 in which plaintiffs have survived a motion to dismiss for lack of standing include *Sprint v. AT&T*[57] and *Omni Healthcare v. Health First*.[58]

Steves v. Jeld-Wen, where the plaintiff was both a competitor and a customer, shows the practical viability of post-closing injunctive relief. Steves and Sons, Inc. and Jeld-Wen, Inc. sold interior molded doors, but Jeld-Wen was also one of three manufacturers that made doorskins, the primary input for finished doors. The DOJ investigated Jeld-Wen's acquisition of Craftmaster International (CMI), another vertically integrated door manufacturer, twice and took no action. During the DOJ's first investigation, Steves informed the DOJ that it did not oppose the merger; Steves and Jeld-Wen had recently entered into a seven-year supply agreement based on Jeld-Wen's costs.[59] After disputes between Steves and Jeld-Wen regarding whether Jeld-Wen was honoring the terms of the supply agreement, Steves brought suit under Section 7 and secured a jury award of $12 million in past damages and $46.5 million in future lost profits, both subject to trebling. In a subsequent remedy proceeding, the judge also ordered Jeld-Wen to divest a Pennsylvania factory,[60] a first for a private merger challenge.[61]

On appeal, Jeld-Wen argued that Steves had waited too long to file the challenge, but the Fourth Circuit upheld the divestiture order, calling the case a "poster child for divestiture."[62] Finding the merger had resulted in a duopoly that threatened Steves' survival, the court found it "reasonable to expect that a third supplier—even one that's vertically integrated—will promote competition, as CMI did before the 2012 merger."[63] The court vacated the future damages award finding that "claim wasn't ripe for adjudication."[64] Jeld-Wen filed a petition for a rehearing en banc arguing that the panel erred "by treating breach-of-contract claims as antitrust claims" and citing procompetitive benefits from integration that would be lost if divestiture occurs and the "eggs are unscrambled."[65] Jeld-Wen's petition was denied.[66]

In *Food Lion v. DFA*, Maryland and Virginia Milk Producers Cooperative Association (a competitor) and Food Lion, LLC (a customer) challenged a consummated vertical merger between Dairy Farmers of America, Inc. and Dean Foods Company. The DOJ had investigated the merger and

sought enforcement action only in markets with horizontal overlaps.[67] Moreover, Dean had filed for bankruptcy, and the bankruptcy court approved the sale of Dean's assets to DFA.[68] The plaintiffs alleged that DFA's acquisition of three Dean milk-processing facilities in North and South Carolina violated Section 7 based on a vertical theory of harm. The plaintiffs sought divestiture of at least one of the facilities. At the outset of the case, the court entered what was effectively a hold separate order, relieving the plaintiff of the need, as had taken place in *Tasty Baking*, to litigate that issue, and thus assuring the plaintiff of the right to be heard before the "eggs were scrambled."[69] DFA's motion to dismiss (based on lack of standing, the failing firm defense, and failure to allege a proper relevant market) was later denied,[70] and the case ultimately settled.[71]

Plaintiffs in *Food Lion v. DFA* sought broader relief than what the DOJ obtained, similar to the plaintiffs in *Blessing v. Sirius XM Radio Inc.*, where the DOJ declined to seek enforcement action but the parties made certain voluntary commitments to obtain FCC approval. Consumers wanted an even broader fix and filed a class action lawsuit alleging the merger violated Section 7 of the Clayton Act as well as Section 2 of the Sherman Act. On the eve of trial, the parties settled for $180 million and $13 million in attorneys' fees.[72]

Another recent competitor challenge that resulted in divestiture is *St. Alphonsus v. St. Luke's*.[73] In 2012, St. Luke's main competitor, Saint Alphonsus Medical Center-Nampa Inc., along with Treasure Valley Hospital LP, filed a complaint alleging that St. Luke's planned acquisition of the Salzer Medical Group violated Section 7 of the Clayton Act Section 7 and Section 1 of the Sherman Act.[74] The FTC and Idaho AG intervened in the litigation in 2013 following their investigation. The private and government cases were subsequently consolidated.[75] The district court ruled in favor of the plaintiffs in 2014 and ordered divestiture,[76] and the Ninth Circuit affirmed.[77]

Saint Alphonsus and Treasure Valley were eventually granted approximately $7.2 million and $335,000, respectively, in fees and costs for their roles in the judgment.[78] St. Luke's appealed these fees, arguing the private plaintiffs had not been the prevailing party in the suit since they lacked standing to bring the claims upon which the government ultimately prevailed.[79] The private plaintiffs responded that the outcome they sought in bringing the case was achieved, and that the court acknowledged contributions from the private plaintiffs' attorneys had been crucial for obtaining that judgment.[80] St. Luke's dropped its appeal in 2018.[81]

There are several important takeaways from these recent private merger challenges. First, an injunction may be available to a private plaintiff even where standing issues would bar a damages claim. Second, the Steves case shows that divestiture, always a theoretically available remedy, can in fact be ordered by the courts, even post-closing, on the right facts. Third, post-closing challenges can remain a risk—Steves filed suit four years after the merger was consummated. Relatedly, agency inaction should not be viewed as inoculating a merger. In *Steves*, the Fourth Circuit adopted the arguments made by the DOJ in its amicus brief in holding that the DOJ's "decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources."[82] This is consistent with other cases where courts have rejected the argument that failure by the federal antitrust agencies "to object to the merger should be regarded as conclusive of its legality."[83]

It is also notable that, because the defendants in these three cases were vertically integrated, the plaintiffs' theory of harm involved some form of foreclosure. Steves was both a competitor and customer, and the court found that by terminating the supply agreement, Jeld-Wen could foreclose Steves from access to doorskins, which in turn would benefit Jeld-Wen's molded door business.[84] In *Food Lion*, the plaintiffs pled that DFA's acquisition of Dean facilities would allow the combined entity to foreclose access to Dean processing plants to plaintiff MDVA, which in turn would result in higher prices of processed milk to plaintiff Food Lion.[85] And in *St. Alphonsus*, the private plaintiffs alleged that St. Luke's acquisition of a rival primary care physician (PCP) group would allow St. Luke's PCPs to foreclose referrals to rival hospitals such as the private plaintiffs. The district court did not address this theory of harm because it ordered the merger to be unwound based on the FTC's case.[86]

There is no evidence that the current trend in private merger enforcement will decline, and it may, in fact, continue to grow. Proposed legislation that would lower the bar for private plaintiffs could also pave the way for increased merger challenges by private parties. A 2020 House Judiciary Committee report recommended certain legislative reform with respect to private antitrust enforcement, including eliminating judicially created standards for antitrust injury and antitrust standing, reducing procedural obstacles to litigation, and lowering the heightened pleading requirement from *Bell Atlantic Corp. v. Twombly*.[87] If the "private attorneys general" contemplated since 1914 take on an even greater role in merger enforcement, it will increasingly become a factor merging parties and their counsel should consider when analyzing competitive issues associated with a proposed transaction. ■

[1] M. Sean Royall & Adam J. Di Vincenzo, *When Mergers Become a Private Matter, an Updated Antitrust Primer*, ANTITRUST, Spring 2012, at 41.

[2] *Id.*

[3] Steves & Sons, Inc. v. JELD-WEN, Inc., No. 19-1397, 2021 WL 630521, at *24 (4th Cir. Feb. 18, 2021).

[4] Royall & Di Vincenzo, *supra* note 1.

[5] Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250 (E.D. Pa. 1987).

[6] Section 16 of the Clayton Act, 15 U.S.C. § 26.

[7] Section 15 of the Clayton Act, 15 U.S.C. § 25.

[8] *In re* High-Tech Employee Antitrust Litig., 985 F. Supp. 2d 1167, 1179 (N.D. Cal. 2013) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977)) (alteration in original).

[9] 442 U.S. 330, 344 (1979).

[10] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[11] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986).

[12] *See, e.g.*, *The FTC's Antitrust Case Against Facebook Stakes Out New Ground*, Bloomberg Business Week (Dec. 16, 2020), https://www.bloomberg.com/news/articles/2020-12-16/facebook-fb-antitrust-case-has-much-different-goal-than-google-s-googl; *The Facebook and Google Antitrust Suits Are a Warning Shot for All Corporate Giants—Not Just Big Tech*, Fortune, (Dec. 10, 2020), https://fortune.com/2020/12/10/facebook-google-antitrust-suits-big-tech-business-corporate-giants/ (both articles referring to FTC having previously "approved" prior Facebook acquisitions now under challenge); Colan v. Cutler-Hammer, Inc., No. 80C 4118, 1986 Westlaw 6233 (N.D. Ill. May 27, 1986), *opinion adopted*, 812 F.2d 357 (7th Cir. 1987) (referring to prior FTC "approval" of a merger later placed in issue by shareholder derivative suit).

[13] *See generally* United States v E.I. du Pont de Nemours and Co., 353 U.S. 586 (1957) (DOJ merger challenge filed 30 years after closing).

[14] Complaint, FTC v. Facebook Inc., No. 1:20-cv-03590-JEB (D.C. Cir. Dec. 9, 2020); Fed. Trade Comm'n, Press Release, Fed. Trade Comm'n, FTC Closes Its Investigation into Facebook's Proposed Acquisition of Instagram Photo Sharing Program (Aug. 22, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition; Alexei Oreskovic, *Facebook Says WhatsApp Deal Cleared by FTC*, Reuters (Apr. 10, 2014), https://www.reuters.com/article/us-facebook-whatsapp-idUSBREA391VA20140410.

[15] Michael Kades, *The State of U.S. Federal Antitrust Enforcement*, Wash. Center for Equitable Growth (Sept. 17, 2019), https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/.

[16] *Hearing on Proposals to Strengthen the Antitrust Laws and Restore Competition Online, Before the Subcomm. on Antitrust, Commercial, and Administrative Law*, 116th Cong. (2020) (statement of Bill Baer, Visiting Fellow, Governance Studies, the Brookings Institution), https://www.brookings.edu/wp-content/uploads/2020/05/Bill-Baer-10.1.20-Testimony-to-House-Antitrust-Subcommittee.pdf [hereinafter Baer Statement].

[17] *FTC Appropriation and Full-Time Equivalent (FTE) History,* https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation (last visited on June 28, 2021).

[18] Kades, *supra* note 15.

[19] *Id.* (1,128 filings in FY 2010 vs. 2,028 filings in FY 2018).

[20] Tim Haney, *A Look Back at Recession's Effect on Merger Challenges*, Law360 (Apr. 23, 2020): (42 second requests in FY 2010 vs. 45 in FY 2018); 41 merger challenges in FY 2010 vs. 39 in FY 2018).

[21] *FY 2021 Omnibus Appropriations Bill*, Nat'l Conf. of State Legislatures (Jan. 4, 2021), https://www.ncsl.org/ncsl-in-dc/publications-and-resources/fy-2021-omnibus-appropriations-bill.aspx.

[22] DOJ, *Appropriation Figures for the Antitrust Division,* https://www.justice.gov/atr/appropriation-figures-antitrust-division (last accessed on June 28, 2021). The President's Budget Request for FY2022 includes an additional $16.6 million increase.

[23] United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir.).

[24] United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017).

[25] Baer Statement, *supra* note 16, at 6.

[26] *In re* Cabell Huntington Hosp., Inc., Pallottine Health Servs., Inc., and St. Mary's Med. Ctr., Inc., FTC 141-0218 (Nov. 6, 2015).

[27] FTC v. Staples, Inc., 190 F. Supp. 3d 100 (D.D.C. 2016) (*Staples II*).

[28] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016).

[29] FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016).

[30] Baer Statement, *supra* note 16, at 6.

[31] United States v. Google LLC, 1:20-cv-03010 (D.C. Cir. Dec. 17, 2020).

[32] FTC v. Facebook Inc., 1:20-cv-03590 (D.C. Cir. Dec. 9, 2020). On June 28, 2021, the court dismissed the complaint but granted the FTC leave to file an amended complaint within 30 days. See ECF No. 73.

[33] Bryan Koenig, *DOJ, Google Looking at Sept. 2023 Date for Antitrust Trial*, Law360 (Dec. 18, 2020).

[34] Kevin Stankiewicz, *DOJ Lawsuit Against Google Is 'Almost an Exact Copy' of Microsoft Case, Says Antitrust Professor*, CNBC (Oct. 20, 2020).

[35] *Hearing on Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online, Before the Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law*, 117th Cong. (2021) (statement of John Thorne), https://docs.house.gov/meetings/JU/JU05/20210225/111247/HHRG-117-JU05-Wstate-ThorneJ-20210225.pdf.

[36] David McLaughlin, *With Democrats Running Antitrust, Amazon and Apple Aren't Safe*, Bloomberg (Jan. 22, 2021), https://www.msn.com/en-us/news/technology/with-democrats-running-antitrust-amazon-and-apple-arent-safe/ar-BB1d05Tj.

[37] Press Release, Fed. Trade Comm'n, FTC to Study the Impact of Physician Group and Healthcare Facility Mergers (Jan. 14, 2021), https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers?utm_source=govdelivery.

[38] Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[39] Press Release, *supra* note 37.

[40] California v. Sutter Health Sys., 130 F. Supp. 2d 1109 (N.D. Cal. 2001).

[41] Washington v. Franciscan Health Sys., No. C17-5690 BHS, 2018 WL 3546802 (W.D. Wash. July 24, 2018).

[42] Merrit Kennedy, *10 State Attorneys General Sue To Block T-Mobile, Sprint Merger*, NPR (June 11, 2019), https://www.npr.org/2019/06/11/731695613/10-state-attorneys-general-sue-to-block-t-mobile-sprint-merger.

[43] *Hearing on Proposals to Strengthen the Antitrust Laws and Restore Competition Online, Before the House Judiciary Committee, Subcomm on Regulatory Reform, Commercial, and Antitrust Law,* 116th Cong. (2020) at 17 (statement of Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute), https://docs.house.gov/meetings/JU/JU05/20201001/111072/HHRG-116-JU05-Wstate-HubbardS-20201001.pdf.

[44] United States v. AT&T Inc., Civil Case No. 17-2511 (RJL) (D.D.C. June 12, 2018); *see also* Chelsea Naso, *AT&T-Time Warner Ruling Paves Way for Industry Overhaul,* Law360 (June 13, 2021) (stating that the "case affirmed that the government has a tough road to walk when trying to prove that a vertical merger, even in a consolidated area like telecommunications, will hurt competition").

[45] Press Release, Fed Trade Comm'n, FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group (June 19, 2019), https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition.

[46] Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson, *In re* UnitedHealth Group and Da Vita, File No. 181-0057 (June 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1529366/181_0057_united_davita_statement_of_cmmrs_p_and_w.pdf.

[47] Press Release, Colorado Att'y Gen. (COAG), Antitrust Challenge and Settlement to the UnitedHealth Group and DaVita Merger Will Safeguard Competition, Cost, and Quality of Healthcare for Seniors in the Colorado Springs Area (June 19, 2019), https://coag.gov/press-releases/06-19-19/.

[48] Press Release, Dep't of Justice, Justice Department Requires Divestitures as Dean Foods Sells Fluid Milk Processing Plants to DFA out of Bankruptcy May 1, 2020), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa.

[49] Food Lion, LLC v. Dairy Farmers of Am., Inc., 1:20-CV-00442-CCE-JLW (M.D.N.C.).

[50] On March 30, 2021, the FTC filed suit to block a vertical merger. Press Release, Fed Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition

of Cancer Detection Test Maker Grail (Mar. 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection. The result of this case may provide guidance on how active the antitrust agencies are likely to be with respect to vertical merger enforcement.

[51] The authors have prepared a table of private merger challenges since 2000 that documents these filing figures and provides summaries of the cases and other information. The table can be found on the ABA's website at https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/atmag-summer-2021/supplements/private-merger-challenges-table.pdf. In addition, a "live" version of the table that will be updated regularly can be found at https://www.huntonak.com/Media/Private-Merger-Enforcement-Chart-Addendum.pdf.

[52] *Brunswick*, 429 U.S. 477 (1977).

[53] *Cargill*, 479 U.S. 104 (1986).

[54] *See Brunswick*, 429 U.S. at 488; *Cargill*, 479 U.S. at 111–12.

[55] *Cargill*, 479 U.S., at 111–12.

[56] Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1254 (E.D. Pa. 1987) ("In any event, as a matter of law, the requirement of direct injury does not apply to claims for injunctive relief.").

[57] Sprint Nextel Corp v. AT&T Inc., Nos. 11-1600, 11-1690, 2011 WL 5188081 (D.D.C. Nov. 2, 2011).

[58] No. 6:13-cv-1509, 2015 WL 275806 (M.D. Fla. Jan. 22, 2015). Nineteen months later, on the eve of trial, the plaintiffs also defeated Health First's motion for summary judgment on 9 of their 10 counts. *See* No. 6:13-cv-1509, 2016 WL 4272164 (M.D. Fla. Aug. 13, 2016).

[59] Steves & Sons, Inc. v. Jeld-Wen, Inc, 988 F.3d 690, 700–01 (4th Cir. 2021).

[60] The DOJ submitted a Statement of Interest supporting the Towanda plant's divestiture as "the best way to preserve and restore competition in the relevant market threatened by, or already harmed by, an anticompetitive merger." Statement of Interest, Steves and Sons, Inc. v. Jeld-Wen, Inc., 3:16-CV-00545-REP (E.D. Va. June 6, 2018), https://www.justice.gov/atr/case-document/file/1069011/download.

[61] The divestiture would take the place of the future lost profits award. *See* Steves and Sons v. Jeld-Wen, No. 3:16-CV-545, 2018 WL 4844173 (E.D. Va. Oct. 4, 2018).

[62] Steves & Sons, Inc. v. Jeld-Wen, Inc., No. 19-1397, 2021 WL 630521, at *24 (4th Cir. Feb. 18, 2021).

[63] *Id.*

[64] *Id.*

[65] Steves & Sons, Inc. v. Jeld-Wen, Inc., Appeal No. 19-1397, No. 16-cv-00545-REP, at 5 (4th Cir. Mar. 4, 2021).

[66] Order Denying Rehearing en Banc, No. 19-1397, 3:16-cv-00545-REP (4th Cir. Mar. 22, 2021).

[67] Final Judgment, U.S. and Plaintiff States v. Dairy Farmers of America, Inc. and Dean Foods Company, No. 1:20-cv-02658 (N.D. Ill. Oct. 6, 2020).

[68] *In re* Southern Foods Grp, LLC, No. 19-36313, ECF No. 1572 (Bankr. S.D. Tex. Apr. 5, 2020).

[69] Stipulated Notice of Material Change Order, Food Lion, LLC v. Dairy Farmers of Am., Inc., 1:20-CV-00442-CCE-JLW (M.D.N.C. July 2, 2020).

[70] Food Lion, LLC v. Dairy Farmers of Am., Inc., 1:20-CV-00442-CCE-JLW, ECF No. 44 (M.D.N.C. July 24, 2020).

[71] Matthew Perlman, *Food Lion Settles Suit over Piece of $433M Dean Foods Deal*, Law360 (Feb. 24, 2021).

[72] *See* Blessing v. Sirius XM Radio Inc., No. 09 CV 10035 HB, 2011 WL 3739024 (S.D.N.Y. Aug. 24, 2011), *aff'd*, 507 F. App'x 1 (2d Cir. 2012) (upholding settlement).

[73] Order, Saint Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 16-36044 (9th Cir. Sept. 25, 2018).

[74] Complaint ¶¶ 126–127, 131, Saint Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 1:12:cv-00560-BLW (D. Idaho Nov. 12, 2012).

[75] Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., Nos. 1:12:cv-00560-BLW, 1:13-cv-000116-BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014). *See also* Complaint, No. 13-cv-116-BLW (D. Idaho Mar. 26, 2013), https://www.ftc.gov/enforcement/cases-proceedings/121-0069/st-lukes-health-system-ltd-saltzer-medical-group-pa.

[76] *Saint Alphonsus Medical Center*, 2014 WL 407446 at *25–26.

[77] Saint Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 781 (9th Cir. 2015).

[78] Amended Judgment for Attorney Fees and Costs at 2, Saint Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 1:12:cv-00560-BLW (D. Idaho Nov. 29, 2016); Mem. Decision at 12, Saint Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 1:12:cv-00560-BLW (D. Idaho Mar. 28, 2016).

[79] Brief of Defendants-Appellants at 26–30, Saint Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 16-36044 (9th Cir. Mar. 20, 2017).

[80] *Id*. at 34.

[81] Order, Saint Alphonsus Med. Ctr. - Nampa Inc. v. St. Luke's Health Sys., Ltd., No. 16-36044 (9th Cir. Sept. 25, 2018).

[82] *Steves & Sons*, 2021 WL 630521, at *15.

[83] *AlliedSignal*, 183 F.3d at 575. But see cases where plaintiffs have not been as successful: Bradt v. T-Mobile US, Inc., No. 19-CV-07752-BLF, 2020 WL 1233939 (N.D. Cal. Mar. 13, 2020). *See also* Malaney v. UAL Corp., No. 3:10-CV-02858-RS, 2010 WL 3790296 (N.D. Cal. Sept. 27, 2010), *aff'd*, 434 F. App'x 620 (9th Cir. 2011); Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc., No. C-09-2854, 2010 WL 1541257 (N.D. Cal. Apr. 16, 2010), *aff'd*, 433 F. App'x 598 (9th Cir. 2011). For an early dismissal from a case where the reviewing agency cleared the deal with no remedy, see Taleff v. Sw. Airlines Co., No. C 11-02179, 2011 WL 6157467 (N.D. Cal. Nov. 30, 2011).

[84] *Steves & Sons*, 2021 WL 630521, at *13.

[85] Complaint, Food Lion, LLC v. Dairy Farmers of Am., Inc., 1:20-CV-00442-CCE-JLW, at ¶¶ 111, 117 (M.D.N.C. July 24, 2020).

[86] *Saint Alphonsus Medical Center.*, 2014 WL 407446, at *24–26.

[87] House Judiciary Committee Majority Report, *Investigation of Competition in Digital Markets* 404 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.