

Mergers which have not resulted in a consent decree and which the DOJ wishes to challenge must be brought before the district courts before the expiration of the waiting period (in the case of mergers which have been notified), usually with a request for a preliminary injunction to block the merger pending the decision of the court.

Decrees or orders may require divestiture of lines of businesses that are the basis for the anticompetitive concern and/or non-structural remedies. In the case of FTC orders, there is provision for prior notification and approval of future acquisitions within the markets that present the anticompetitive problems in the transaction that is the subject of the order. A proposed FTC consent order must be accepted by a majority vote of the Commission and placed on the public record for notice and comment period before it can be made final by the Commission. In the case of the Department of Justice, a proposed settlement must be approved by the Assistant Attorney General for Antitrust and also placed on the public record for a notice and comment period before it will be entered by a federal district court.

If the losing party in a merger case wishes to appeal a district court's decision, it must do so within 60 days of entry of the judgment. Further review may be available in the U.S. Supreme Court in some circumstances. Since 1975, the Supreme Court has not reviewed any government-initiated merger cases.

Parties to an FTC adjudicative proceeding may appeal the Administrative Law Judge's initial decision, in the first instance, to the Commission and, within 60 days of the Commission's final order, to the appropriate federal court of appeals. There is also a discretionary appeal to the Supreme Court.

The FTC and DOJ, therefore, are assigned a law enforcement role rather than a regulatory role.

Mergers are subject to several anti-trust provisions:

- 1) section 7 of the Clayton Act is the principal statutory provision under which stock and assets acquisitions, including mergers and joint ventures, may be held illegal where their effect "may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce or in any section of the country";
- 2) section 5 of the Federal Trade Commission (FTC) Act prohibiting "unfair methods of competition", has also been used to condemn mergers although