STATEMENT OF CRAIG CONRATH
ON BEHALF OF
THE UNITED STATES DEPARTMENT OF JUSTICE

ANTITRUST MODERNIZATION COMMISSION
HEARING ON THE PRELIMINARY INJUNCTION STANDARD

NOVEMBER 3, 2005

The Commission asked the Antitrust Division to supply testimony addressing the Division's application of the preliminary injunction standard in merger litigation. This testimony will address two subjects. First, the legal standard for granting a preliminary injunction in a merger case brought by the Antitrust Division. Second, the practice of the Division in using its prosecutorial discretion to decide when to seek a preliminary injunction.

The Preliminary Injunction Standard in Antitrust Division Merger Cases

The Antitrust Division typically challenges mergers[1] under Section 15 of the Clayton Act, 15 U.S.C. § 25,[2] to prevent and restrain a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Mergers may also be challenged under Section 4 of

[1] "Mergers" is used here to include acquisitions.

[2] Restraining violations; procedure The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof. 15 U.S.C. § 25.

the Sherman Act, 15 U.S.C. § 4,[3] to prevent and restrain a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. In either case, the statute expressly references the courts' equity powers and expressly authorizes the Division to seek preliminary relief.

The procedural posture of merger litigation often is influenced by the premerger notification and waiting periods established by the Hart-Scott-Rodino (HSR) Act, 15 U.S.C. § 18a. The HSR Act was designed to give the United States "a meaningful chance to win a premerger injunction – which is often the only effective and realistic remedy against large, illegal mergers." H.R. Rep. No. 94-1373, at 5 (1976). The HSR Act was passed to address a number of problems, including, most notably, the problem exposed by the Congressional finding that post-consummation merger challenges lasted on average more than five years. *Id.* at *9.

The Division sometimes litigates merger cases initially in preliminary

[3] Jurisdiction of courts; duty of United States attorneys; procedure The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. 15 U.S.C. § 4.

injunction hearings.[4] In other merger cases, when a reasonable schedule has been negotiated that accommodates the Division's right to a fair trial,[5] the Division agrees, pursuant to Rule 65(a)(2),[6] to a consolidated proceeding combining the preliminary injunction hearing with the trial on the merits.[7] In other instances, Division litigation is scheduled to proceed directly to a trial on the merits.[8]

A preliminary injunction serves the "limited purpose" of "preserv[ing] the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Preliminary relief is granted to

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[4] *E.g., United States v. UPM-Kymmene Oyj*, 2003 WL 21781902, 2003-2 Trade Cas. (CCH) ¶ 74,101 (N.D. Ill. 2003); *United States v. Gillette Co.*, 828 F. Supp. 78, 80 (D.D.C. 1993).

[5] Consolidation of a trial on the merits with a preliminary injunction hearing is an abuse of discretion if it deprives a party of its right fully and fairly to present its case on the merits. *See* 7 J. Moore, *Moore's Federal Practice* ¶ 65.04[4]; 11A C. Wright & A. Miller, *Federal Practice & Procedure,* § 2950; *see, e.g., Paris v. HUD*, 713 F.2d 1341, 1345-46 (7th Cir. 1983); *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972) (Stevens, J.).

[6] *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Fed. R. Civ. P. 65(a)(2).

[7] *E.g., United States v. Sungard Data Systems, Inc.*, 172 F. Supp. 2d 172, 179 (D.D.C. 2001); *United States v. Rockford Mem. Corp.*, 717 F. Supp. 1251, 1252 (N.D. Ill. 1989), *aff'd,* 898 F.2d 1278 (7th Cir. 1990) (consolidation agreed after preliminary injunction hearing).

[8] *E.g., United States v. First Data Corp.*, Memorializing Order, October 28, 2003; *United States v. Compuware Corp.* (D.D.C. filed Oct. 29, 1999); *United States v. Northwest Airlines* (E.D. Mich. filed Oct. 23, 1998); *United States v. Primestar* (D.D.C. filed May 12, 1998); *United States v. Northwest Arkansas Times L.C.*, 892 F. Supp. 1146 (W.D. Ark. 1995), *aff'd,* 139 F.3d 1180 (8th Cir. 1998).

"create or preserve a state of affairs such that [the court] will be able, upon conclusion of the full trial, to render a meaningful decision for either party." *Developments in the Law – Injunctions*, 78 Harv. L. Rev. 994, 1056 (1965).

The Federal Rules do not prescribe a standard for granting or denying a preliminary injunction, and accordingly historic equitable considerations are applied.[9] The factors in the decision are commonly described as:

1. the probability that plaintiff will succeed on the merits;
2. the significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
3. the state of the balance between this harm and the injury that granting the injunction would inflict on defendant; and
4. the public interest.

See 11A Wright § 2948 (collecting cases). *See also American Hospital Supply Corp. v. Hospital Products, Ltd.*, 780 F.2d 589, 594-95 (7th Cir. 1986) (Posner, J.); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 382-83 (7th Cir. 1984) (Posner, J.).

Sometimes these standards, applied to antitrust cases, are effectively

[9] As to Sherman Act § 4, the Supreme Court has expressly said that standard equitable principles apply. *De Beers Consol. Mines v. United States*, 325 U.S. 212, 218-19 (1945).

collapsed, or expressed in a shorter form. Thus, it is commonly said that a party seeking a preliminary injunction must make two threshold showings: (1) some likelihood of success on the merits, and (2) in the absence of the injunction, irreparable harm. *See AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999). Once these initial requirements are met, a district court "engages in a 'sliding scale' analysis by balancing the harms to the parties and the public interest." *Id.*

Although courts have applied the traditional equity standard of irreparable injury to private actions brought under section 7 of the Clayton Act, they have recognized that a different test is appropriate where the government seeks preliminary relief under the Act. Courts have held that where the government shows a probability of success on the merits, it need not make a separate showing of irreparable injury. *See United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980);[10] *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3d Cir. 1963).

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[10] In *Siemens*, the Second Circuit summarized the logic: "The proper test for determining whether preliminary relief should be granted in a Government-initiated antitrust suit is whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor. . . . [O]nce the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed. . . . To warrant that presumption, however, the Government must do far more than merely raise sufficiently serious questions with respect to the merits to make them a fair ground for litigation. . . . Nor does proof of likelihood of success on the merits relieve a court of equity of the duty to balance hardships . . . . 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 . . . ." *Siemens*, 621 F.2d at 505-06 (citations omitted).

Indeed, the Supreme Court in dictum stated that "[i]n a Government case [under Clayton Act, section 15] the proof of the violation of law may itself establish sufficient public injury to warrant relief." *California v. American Stores Co.*, 495 U.S. 271, 295 (1990).

Deciding When to Seek a Preliminary Injunction

The Division uses its prosecutorial discretion to seek a preliminary injunction when one is needed to preserve the opportunity for meaningful relief. Normally, if the merging parties can close the transaction once the HSR waiting period is terminated, then the Division seeks a preliminary injunction to stop the transaction pending a decision. If, by contrast, the merging parties cannot close the transaction shortly after the case is filed – for example because of regulatory requirements or corporate law obligations – then the Division does not seek a preliminary injunction. For example, in the labelstock merger case, the Division sought a preliminary injunction because "[t]he closing of the . . . transaction was to occur as soon as the parties obtained the European Commission's approval and U.S. Hart-Scott-Rodino clearance . . . . There were no significant conditions to closing other than the European and American merger clearances." *UPM-Kymmene Oyj*, 2003-2 Trade Cas. (CCH) ¶ 74,101 (N.D. Ill. 2003). The European Commission had

approved the merger by the time of the Antitrust Division's complaint, so the merger could have been consummated almost immediately if the Division had not obtained a preliminary injunction. By contrast, in *United States v. Echostar Communications Corp.*, (D.D.C., filed Oct. 31, 2002), the United States did not seek a preliminary injunction because "[t]his transaction cannot be completed by the Defendants' self-imposed deadline – regardless of what this Court does – because they need Federal Communications Commission (FCC) approval to complete their transaction. But they do not have FCC approval and are unlikely to obtain it any time soon, if ever." Memorandum in Support of Plaintiffs' Motion for Scheduling Order (D.D.C. filed Nov. 4, 2002).[11] In some cases, the Division reaches agreement with the merging parties that they will not close the transaction pending the outcome of the litigation. *E.g., United States v. Compuware Corp.* (D.D.C. Oct. 29, 1999) (merging firms stipulated to no temporary restraining order or preliminary injunction proceeding and agreed not to close before trial).

In short, the Division seeks a preliminary injunction if the merger transaction is likely to be consummated without it because (1) effective post-trial relief is unlikely to be available if the merger has occurred and (2) anticompetitive harm may begin immediately because of the competition that is lost from the merger.

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[11] *See United States v. Chancellor Media Co.*, (E.D.N.Y. filed Nov. 6, 1997) (no preliminary injunction sought; transaction subject to regulatory approval).

Effective post-trial relief is unlikely to be available if a merger has occurred because the assets are likely to have been scrambled and it likely would be difficult to re-establish the acquired firm as a competitively significant entity. The legislative history of the HSR Act recounts in detail how difficult it is to disentangle companies after consummation and to restore the acquired firm's competitiveness. Congress noted that once firms have consummated, they have "no incentive to litigate the issues speedily" and after the ensuing litigation, the "acquired firm is never restored as a vigorous, independent competitor, and the damage to the marketplace is never repaired." H.R. Rep. No. 94-1373 at 9-10. These were the reasons for passage of the HSR Act to allow premerger review of significant transactions. Thus, the Division seeks preliminary injunctions in order to effectively enforce the laws against anticompetitive mergers.