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Did the Supreme Court Just Make It Harder for the FTC to Block Mergers?

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For most litigated mergers, the preliminary injunction hearing is decisive: if the FTC or DOJ obtains a preliminary injunction, parties frequently abandon the deal before the case is fully litigated on the merits, and conversely, if the district court denies the preliminary injunction, the FTC or DOJ generally drops the case rather than pressing on in hope of an eventual divestiture. And on that critical question, the FTC (according to many courts) faces a lower burden of proof than either DOJ or a private plaintiff, because it—not the district court—will ultimately adjudicate the complaint.

As one district judge explained earlier this year in granting the FTC's request to block the IQVIA/Propel Media merger, when seeking a preliminary injunction in aid of a Part 3 administrative proceeding, the FTC need not "prove its case or establish a violation of the Clayton Act," but rather must only "show[] prima facie that the public interest requires that a preliminary injunction issue to preserve the status quo until the FTC can perform its adjudicatory function."[1] That distinction matters: the same district court, for example, concluded that despite conflicting expert testimony, the FTC need only "raise some question of whether [its proposed market] is a well-defined market."[2]

In a decision issued last week, however, the Supreme Court cast significant doubt on whether the FTC will be able to continue to play that trump card. The decision in Starbucks Corp. v.

McKinney involved a request by the National Labor Relations Board (NLRB) for a preliminary injunction restoring what it viewed as the status quo while the Board reviewed a labor dispute between Starbucks and six of its employees. Although the details of the labor law dispute aren't particularly relevant here, what matters is that the NLRB, like the FTC, sought a preliminary injunction in aid of an administrative proceeding in which it would be the finder of fact and law and pointed to a statutory provision seemingly providing it a more generous standard for preliminary injunctive relief than private parties.

As the Supreme Court explained in vacating the injunction, "[w]hen Congress empowers courts to grant equitable relief, there is a strong presumption that courts will exercise that authority in a manner consistent with traditional principles of equity." In the Court's view, the National Labor Relations Act's (NLRA) direction that a district court "grant to the Board such temporary relief . . . as it deems just and proper" was not sufficient to displace that presumption; rather, "the phrase 'just and proper' invokes the discretion that courts have traditionally exercised when faced with requests for equitable relief."[3] Writing for an eight-justice majority, Justice Thomas therefore rejected the idea that the NLRB "need not convince the court of the validity of its theory of liability, as long as the theory is substantial and not frivolous." It must instead meet the traditional four-factor equitable test, including the requirement that the NLRB "make clear showing that it is likely to succeed on the merits," with the district court "evaluat[ing] any factual conflicts or difficult questions of law" that arise.[4]

The parallels to both the FTC Act and the holdings of the various courts that have held the FTC to a lower burden of proof are evident. Section 13(b) of the FTC Act, which authorizes the FTC to seek a preliminary injunction, describes the test as being whether the FTC has made a "proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, [a preliminary injunction] would be in the public interest."[5] It therefore not only echoes the "just and proper" language the Supreme Court pointed to in *Starbucks* as calling for the traditional standard but, unlike the NLRA provision at issue there, expressly requires a showing of a "likelihood of ultimate success." And just like the losing position in *Starbucks*, the FTC argues in its merger cases that it too does not need to "prove its case" to the district court, so long as it raises substantial questions.

To be sure, the Supreme Court did not rule on the applicability of the traditional equitable test or likelihood of success requirement in the FTC Act context, and the circuit precedent in several circuits is still in favor of the FTC. But thanks to the Court's decision in *Starbucks*, merging parties at least have a new arrow in their quiver to argue that precedent is wrong and should be overruled if they can hold their deals together long enough to get that ruling.

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[1] *FTC v. IQVIA Holdings, Inc.* at *18 (S.D.N.Y. Jan. 8, 2024).

[2] *Id.* at *25.

[3] *Starbucks* at *6.

[4] *Id.* at *9.

[5] 15 U.S.C. § 53(b).

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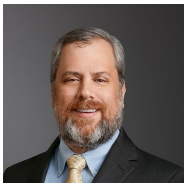

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