Standards for Evaluating Requests for Preliminary Injunctive Relief in Merger Cases

Patricia Neeham Marucci

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Standards for Evaluating Requests for Preliminary Injunctive Relief in Merger Cases

INTRODUCTION

Section 7 of the Clayton Act\(^1\) prohibits acquisitions of stock or mergers which may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country. Effective enforcement of section 7 may be impossible where consummation of the merger has occurred and restoration of the merged organizations' separate identities is impractical. A preliminary injunction to prevent the consummation of a merger can serve to maintain the status quo pending determination of the antitrust charges at a plenary hearing.\(^2\)

Traditional equitable analysis to determine whether a preliminary injunction is appropriate focuses on the plaintiff's likelihood of success on the merits, the possibility of irreparable harm, the equities, and the public interest.\(^3\) A more liberal test, originating in the Second Circuit, permits an injunction to issue when the balance of the equities weighs in favor of the plaintiff and there has been a "serious and substantial" showing on the merits.\(^4\) Which

1. 15 U.S.C. § 18 (1976). Section 7 provides in pertinent part:
   No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

2. The court in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953) characterized the nature of a preliminary injunction as follows:
   For a preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness. It serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit is on, as far as possible in their respective positions they occupied when the suit began.

   Id. at 742.

   The procedure governing temporary restraining orders and preliminary injunctions is found in Fed. R. Civ. P. 65.

3. For a general discussion of the preliminary injunction, see D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES, EQUITY, OR RESTITUTION § 2.10 (1973).

4. This Second Circuit test originated in Sonesta Int'l Hotels Corp. v. Wellington Assoc., 483 F.2d 247 (2d Cir. 1973). See notes 20-32 infra and accompanying text for further
test should be applied to an application for preliminary relief in an antitrust case touches on basic policy issues at the heart of antitrust law. Preservation of a free and competitive marketplace supports arguments favoring the broad use of preliminary injunctions to diminish any threat of antitrust violations. Protection of private interests supports a more conservative approach to insure shareholders their right of access to the marketplace. The type of merger involved—vertical, horizontal, or conglomerate—is an additional factor to be considered in whether to apply a particular analysis. Finally, the nature of the plaintiff’s interests also may be critical. The Federal Trade Commission (FTC), Department of Justice, and private plaintiffs each are empowered to seek preliminary injunctive relief where an antitrust violation is alleged.5

This note will discuss the tests used by the courts in determining whether to grant preliminary injunctive relief in antitrust cases. First, the traditional analysis and the alternative approach of the Second Circuit will be presented, with particular attention to the implications of these tests for merger cases. Second, courts have differentiated their analysis of injunctive relief based on whether the plaintiff is the FTC, the Justice Department, or a private party. The underlying rationale for this approach and its disparate results will be delineated. Finally, a uniform standard of analysis will be proposed which could be applied to all requests for preliminary injunctive relief where an antitrust violation is alleged.

**EVALUATION OF THE NEED FOR PRELIMINARY INJUNCTIVE RELIEF:**

**TWO MODELS**

**Traditional Equitable Analysis**

Traditionally, courts have refrained from issuing the drastic remedy of a preliminary injunction,6 and have limited their use to cases where the issuance of an injunction is necessary to preserve the status quo pending resolution of the underlying conflict.7 Pres-

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7. II H. TOULMIN'S ANTITRUST LAWS § 28.7 (1949). See also FTC v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976); United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); Harriman v. Northern Securities Co., 134 F. 331 (3d Cir. 1905); United States v.
Injunctive Relief in Merger Cases

Reservation of the status quo in merger cases is especially important, since maintaining the organizations as separate entities prevents commingling of assets, employees, and trade secrets. Such commingling can make final relief difficult and ineffective. Yet, the granting of a preliminary injunction often effectively means a final resolution, where the parties abandon the merger rather than face complex, costly, and time-consuming litigation. The final effect of the grant or denial of a preliminary injunction on the merger is an unarticulated factor often considered by the courts in their decisions.

Under the traditional equitable test, whether or not a merger should be enjoined is dependent upon a showing by the plaintiff that (1) there is a significant threat of irreparable harm to the plaintiff if the injunction is denied; (2) the irreparable harm to the plaintiff if the injunction is denied outweighs the injury defendant would suffer if the injunction were granted; (3) the plaintiff will likely succeed on the merits; and (4) the public interest weighs in favor of the injunction.

Applying these factors more specifically to the merger context, the threshold showing of irreparable injury can be satisfied by demonstrating threatened injury to competition. This reflects the general policy of the antitrust laws to preserve and protect the competitive nature of the economy, and the specific goal of the Clayton Act to halt violations of that policy in their incipiency. The threatened injury to competition, however, must be substantial to withstand the equities which may be raised by the opposing party.

Balancing the equities includes consideration of alternative remedies to the preliminary injunction. Because of the drastic nature of preliminary injunctive relief, courts often opt instead for the

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8. See text accompanying note 101 infra.
11. The Senate Committee Report on § 7 of the Clayton Act stated the intent of Congress was "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 741 (2d Cir. 1953), citing S. Rep. No. 1775, 81st Cong., 2nd Sess. 4-5 (1950).
remedies of hold-separate orders or divestiture.\textsuperscript{18} Hold-separate orders allow the merger to proceed as planned, yet prohibit commingling of assets, trade secrets, or employees pending resolution of the antitrust claim.\textsuperscript{13} Maintaining the autonomy of each organization ideally preserves the status quo without provoking abandonment of the merger. A divestiture order requires the acquiring company to sell the acquired company. The availability of divestiture as final relief may persuade some courts to balance the equities in favor of the defendant. It may also be raised to refute the plaintiff's allegation that merger would cause irreparable injury. Often, however, divestiture is unwieldy and counterproductive. Acquired companies may have divulged trade secrets and relinquished their independence by the time the antitrust violation is found and divestiture ordered. Key management personnel may have left and customers may have established new allegiances with a rival company.\textsuperscript{14} In addition, a purchaser must usually be found for the divested company, a difficult and costly task.\textsuperscript{15} The remedy of divestiture also is not uniformly available to private plaintiffs.\textsuperscript{16} Courts excluding divestiture as a private remedy should be more willing to balance the equities in favor of the private plaintiff.

The third requirement of the traditional analysis, of likelihood of success on the merits, again reflects the seriousness of the injunctive remedy. The plaintiff's showing of success cannot be merely speculative. Traditionally, antitrust claims require complex analysis, which may involve determining market share percentages, the presence of trade restraints, and defining the relevant product

\begin{itemize}
\item \textsuperscript{12} See text accompanying notes 94-96 infra.
\item \textsuperscript{13} See generally, \textit{Antitrust Advisor} §§ 3.62 and 3.56 (2d. ed. C. Hills ed. 1978).
\item \textsuperscript{14} Many courts compare the attempt to separate commingled assets to the unwieldy task of "unscrambling eggs." See text accompanying note 27 infra.
\item \textsuperscript{15} Schlitz was reported to have lost as much as $21 million as the result of its forced divestiture of John Labatt, Ltd., General Brewing Corp. and Burgermeister. Yet Brown Shoe was reported to have made a pre-tax profit of $14 million on the sale of Kinney Shoes. \textit{Antitrust Advisor} § 3.54 (2d ed. C. Hills ed. 1978).
\end{itemize}
1981] Injunctive Relief in Merger Cases 507

market. Producing sufficient proof of a violation at the preliminary hearing is a considerable task. Nevertheless, the plaintiff must prevail on this question in order to succeed. This heavy burden of proof is somewhat balanced by policy assumptions which favor the plaintiff in consideration of the final factor of public interest. Recognizing the insidious nature of antitrust violations, Congress did not compel a full hearing on the merits before preventive relief could issue. Rather, when the plaintiff has shown a likelihood of success on the merits, the potential of irreparable injury, and a balance of equities in its favor, public interest clearly compels the court to protect the competitive nature of the marketplace by enjoining alleged violations of the antitrust laws.

The Sonesta Analysis

Although the majority of courts use the traditional analysis when evaluating a request for a preliminary injunction, the Second Circuit adopted an alternative test beginning with its decision in Hamilton Watch Co. v. Benrus Watch Co. In Hamilton Watch, the plaintiff corporation attempted to prevent a takeover by seeking a preliminary injunction restraining defendant from voting its newly-obtained shares before resolution of the underlying antitrust claim. The court, citing tenuous authority, did not require the

17. See generally ABA, ANTITRUST LAW DEVELOPMENTS (1975).
19. The public interest the government has in preventing concentration in any industry which may damage competition is readily recognized by the courts. See, e.g., FTC v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976) (merger of two local retail food stores was challenged; the court accorded the public interest in preserving competition such importance that it refused to consider any private harm the defendants would suffer if the merger was enjoined); United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963) (government challenged merger of a manufacturer of industrial machinery with three manufacturers of underground coal mining machinery); United States v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969), aff'd sub nom., Bartlett v. United States, 401 U.S. 986 (1971) (injunction granted preventing the merger of Sinclair Oil Co. and Atlantic Richfield Co.); United States v. Wilson Sporting Goods, Inc., 288 F. Supp. 543 (N.D. Ill. 1968) (preliminary injunction granted preventing merger between a sporting goods manufacturer and a gymnastic equipment manufacturer); United States v. Crocker-Anglo Nat'l Bank, 223 F. Supp. 849 (N.D. Cal. 1963) (the court found that public interest was so strong it precluded any claim of irreparable harm; nevertheless, the injunction restraining the merger of two banks was denied for failure to show a likelihood of success).
20. 206 F.2d 738 (2d Cir. 1953).
21. The court relied, in part, on Harriman v. Northern Securities Co., 134 F. 331 (3d Cir. 1905), a Third Circuit case which arguably suggested a new test. In Harriman, the plaintiff sought an injunction restraining the defendant from disposing of the stock of Northern Pacific Railroad as a dividend, where defendant allegedly held the stock solely in trust for the plaintiff. Although the plaintiff was unable to show a likelihood of success on the merits, the
traditional showing of likelihood of success on the merits and irreparable harm to uphold the injunction. Instead, it required only that the balance of equities tipped toward the plaintiff, and that the plaintiff raised “serious and substantial questions going to the merits.”22 The court based this major departure from the traditional test on the legislative intent of section 16 of the Clayton Act.23 The Senate Committee Report on the Act stated that the intent of the section was “to cope with monopolistic tendencies in their incipiency.”24 The court concluded that judicial interference with the merger process at an early stage seemed to be the “paramount aim” of the statute.25

This test received limited use in the Second Circuit until it was again utilized two decades later in Sonesta International Hotels Corp. v. Wellington Associates.26 As in Hamilton Watch, the plaintiff in Sonesta was seeking a preliminary injunction to delay a takeover by the defendant. The plaintiff alleged that defendant had violated securities regulations by failing to disclose material facts in the tender offer, and sought a preliminary injunction to enjoin the takeover pending resolution of the allegations. The plaintiff was unable to show a likelihood of success on the merits. Yet the Sonesta court only required the presence of serious and substantial questions on the merits. The court, recognizing the in-

district court allowed that a showing of serious and substantial questions was sufficient to grant a preliminary injunction, where the defendant has failed to allege any harm that would be suffered if the injunction was granted. Harriman v. Northern Securities Co., 132 F. 464 (C.C.N.J. 1904).

On appeal, the grant of the injunction was reversed. The Court of Appeals, while allowing that the test may have been appropriate, reversed on the facts of the case, finding that the plaintiff could not show a likelihood of success. 134 F.331. Thus, although the court did not expressly overrule the lower court’s method of evaluation, sub silentio it appeared to discard that test in favor of the traditional equitable standard. Nevertheless, the Hamilton Watch court relied on the Third Circuit’s failure to expressly overrule the lower court to support a new test for the Second Circuit.

22. The court described the test as follows:

To justify a temporary injunction it is not necessary that the plaintiff’s right to a final decision, after a trial, be absolutely certain . . . if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).
23. Id. at 741-42.
herent difficulty in dissolving a merger after assets, trade secrets, and employees had been combined, likened the task of divestiture to that of "unsrambling eggs." This tipped the balance of equities in favor of the plaintiff and the injunction was upheld.

The Sonesta test, embodying a liberalized approach toward analyzing preliminary injunctive relief, continues to be followed in the Second Circuit, and also has been adopted by the Fourth, Sixth, and Ninth Circuits. The test is most widely applied in suits brought by private parties. The frequent inability of private plaintiffs to achieve effective final relief once merger has occurred, and the potentially severe and irreparable harm that may occur if the merger is not enjoined, have persuaded many courts to use the more flexible Sonesta test in evaluating requests for preliminary injunctions. These factors are absent when the government is the plaintiff. Thus, where the government is the plaintiff, the traditional test must usually be satisfied.

Analytical Anomaly: Conglomerate Merger

Whether the traditional or Sonesta analysis is used, the most determinative factor on the outcome of a motion for preliminary relief is the type of merger being challenged. Preliminary injunctions may be sought to enjoin vertical, horizontal, or conglomerate mergers. A vertical merger is defined as a merger in which a company acquires a former customer or supplier. A horizontal merger is commonly defined as a merger between direct competitors. A

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27. Id. at 250.
32. There is considerable controversy among the circuits on the question of whether divestiture should be available to the private plaintiff. It is not always allowed. See note 16 supra and accompanying text.
33. 16A J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 17.03 (6th ed. 1979). [hereinafter cited as VON KALINOWSKI]. Professor Turner defines the vertical merger as the acquisition of the stock or assets of a firm that buys the product sold by the acquirer or sells a product bought by the acquiror. Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 HARV. L. REV. 1313, 1315 (1965) [hereinafter cited as Turner].
34. VON KALINOWSKI, supra note 33, at § 17.01. Professor Turner defines the simple horizontal merger as the acquisition of a firm producing and selling an identical product or close substitute in the same geographical market. Turner, supra note 33, at 1315.
conglomerate merger is one in which the merged companies are neither competitors nor are they potential or actual customers or suppliers of each other. Requests for preliminary injunctions involving horizontal and vertical mergers are amenable to traditional or Sonesta analysis. Conglomerate mergers, however, elude injunctions under either analysis.

A conglomerate merger is, very simply, the merger of two organizations whose product or focus of competition does not overlap. Consequently, there is rarely an anticompetitive effect occasioned by the merger which is measurable using traditional antitrust analysis. Anticompetitive mergers may be attacked by relying on traditional analytical tools of market share and relevant product market. Conglomerate mergers, however, do not result in any immediate anticompetitive effects. Conglomerate mergers, therefore, must be challenged through the non-traditional antitrust theories of reciprocity, entrenchment, and potential competition.

35. A conglomerate merger is a merger in which the merged companies are neither competitors nor potential or actual customers or suppliers of each other. Von Kalinowski, supra note 33, at § 17.06. Professor Turner defines the conglomerate merger as any acquisition that is not a simple horizontal or simple vertical merger. Turner, supra note 33, at 1315.


38. See note 35 supra.


40. Entrenchment is the use by the acquired firm of the vast resources of the acquiring firm to entrench itself in the market. It is also referred to as the "deep pocket" theory. See generally Bauer, Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation, 58 B.U.L. Rev. 199 (1978).
These legal theories have met with only limited success.\textsuperscript{41} Consequently, most plaintiffs, whether government or private, fail to show a likelihood of success on the merits when confronting a conglomerate merger.\textsuperscript{42}

If the plaintiff succeeds in showing a likelihood of success, the hurdles of irreparable harm and balancing the equities remain. The availability of divestiture does not absolutely preclude a showing of irreparable harm in horizontal or vertical merger cases.\textsuperscript{43} It becomes, however, a more formidable obstacle to a showing of irreparable harm in a conglomerate merger—one upon which courts have consistently based their decisions denying preliminary relief.\textsuperscript{44} In a horizontal or vertical merger, the potency of divestiture as a final remedy may be offset by the realization of its vulnerability in situations where trade secrets, assets, customers, and confidences are so easily commingled.\textsuperscript{45} In a conglomerate merger, however, those pragmatic considerations are lessened, if not totally absent.

Private plaintiffs encounter the same frustration as the government in challenging conglomerate mergers. Requests for preliminary injunctions to enjoin consummation of a conglomerate merger have, with one exception, been denied.\textsuperscript{46} One might expect a different result with the Sonesta test, where a showing of a likelihood of success on the merits is not required. Plaintiffs evaluated under


\textsuperscript{42} \textit{See generally} Bauer, note 40 supra. \textit{See also} Turner, note 33 supra.


\textsuperscript{44} \textit{See} text accompanying notes 12-13 supra.


\textsuperscript{46} \textit{See} text accompanying notes 14-15 supra.

\textsuperscript{47} A preliminary injunction was issued in Allis-Chalmers Mfg. Co. v. White Consolidated Indus., Inc., 414 F.2d 506 (3d Cir. 1969). The court found a probability of an antitrust violation based on the theories of potential competition and reciprocity. The court noted, however, that this was not a pure conglomerate situation, but included elements of horizontal and vertical mergers.
this test, however, have likewise failed to tip the balance of equi-
ties in their favor. 48

EVALUATION OF PRELIMINARY INJUNCTIVE RELIEF BY THE NATURE
OF THE PLAINTIFF: GOVERNMENT AND PRIVATE PARTIES

The distinguishing feature in the application of injunction analy-
ysis within the merger context, apart from the conglomerate merger
anomaly, is that variation in analysis is premised on the nature of
the party seeking the injunction. Differences are recognized be-
tween the two government agencies entrusted with enforcement of
the Clayton Act; the FTC and the Justice Department. A distinc-
tion is also made between government plaintiffs and private plain-
tiffs. These analytical variations are critical to determining
whether injunctive relief will be granted and therefore merit indi-
vidual discussion to understand the courts' rationale in following
this approach.

Federal Trade Commission

Until recently, the Federal Trade Commission had no power to
bring an action for a preliminary injunction to enjoin the consum-
ption of a merger, even though it was entrusted with the enforce-
ment of section 7 of the Clayton Act. 49 The FTC only could issue a
cease-and-desist order upon finding an antitrust violation. 50 The

687 (2d Cir. 1973); Carrier Corp. v. United Technologies Corp., 1978-2 Trade Cas. ¶ 62,393
(N.D.N.Y.), aff'd, 1978-2 Trade Cas. ¶ 62,405 (2d Cir. 1978).

49. See FTC v. International Paper, 241 F.2d 372 (2d Cir. 1956), where the court refused
to recognize jurisdiction under the All Writs Act for the purpose of allowing the FTC to
seek preliminary injunctive relief. The court reasoned that Congress had made explicit pro-
visions for the Department of Justice and private parties to enforce the Clayton Act,
through §§ 15 and 16 of the Clayton Act, respectively. Congress' failure to provide a similar
enforcement mechanism for the FTC signified its intent to confine the enforcement mecha-
nism of the FTC to its use of the cease-and-desist order. The court viewed the FTC's suit
under the All Writs Act as an attempt to circumvent Congressional intent, and denied
jurisdiction.

50. The FTC's cease-and-desist power is found in 15 U.S.C. § 45(b) (1976), which pro-
vides in pertinent part:

Whenever the Commission shall have reason to believe that any such person, part-
nership, or corporation has been or is using any unfair method of competition or
unfair or deceptive act or practice . . . [t]he person, partnership, or corporation so
complained of shall have the right to appear at the place and time so fixed and
show cause why an order should not be entered by the Commission requiring such
person, partnership, or corporation to cease and desist from the violation of the
law so charged in said complaint.
agency's inability to obtain a preliminary injunction to enjoin a merger pending a finding on the merits, however, frustrated enforcement where the completed merger was insoluble.

Congress was initially unresponsive to the FTC's requests for legislation empowering the agency to grant preliminary injunctions on its own initiative. The Supreme Court, however, recognized the FTC's need to effectively restrain mergers until the agency could make a final determination on the alleged antitrust violation. In *FTC v. Dean Foods Co.*, the Supreme Court allowed the FTC to bring suit to enjoin a merger under the All Writs Act. This procedural mechanism allowed the FTC, in effect, to obtain a preliminary injunction. This device received only limited use, however, and was replaced by a direct statutory grant of power in 1976, codified as section 13(b) of the FTC Act. This section authorizes the agency to seek injunctive relief in the district courts for antitrust violations.

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51. See Note, Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act, 40 N.Y.U. L. Rev. 771, 783 (1965), where the author cites an address made by Commissioner MacIntyre to the Conference on Antitrust Laws and Trade Regulation, Federal Bar Association on January 4, 1962.


54. The All Writs Act empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1976). The All Writs Act is the source of authority for all orders issued by a Federal court which preserve its jurisdiction: writs of mandamus, habeas corpus, certiorari, quo warranto, coram nobis, etc. Its unusual use in this context allowed the court to circumvent the legislature's inaction. Under this rule, a preliminary injunction issues from the appropriate Court of Appeals, ostensibly to protect the effective exercise of its appellate jurisdiction.


56. 15 U.S.C. § 53(b) (1976). This was an amendment to the Federal Trade Commission Act, Pub. L. No. 93-153, 87 Stat. 592. The section provides in pertinent part:

Whenever the Commission has reason to believe that any person, partnership or corporation is violating, or is about to violate any provision of law enforced by the Federal Trade Commission . . . the Commission . . . 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.

57. Id. It should be noted that the FTC may seek an injunction even before the official issuance of the FTC complaint. 15 U.S.C. § 53(b)(2). This allows the FTC to further the purpose of the antitrust laws to cope with antitrust violations in their incipiency. See text accompanying note 24 supra.
Required Showing on the Merits

The legislative history of section 13(b) suggests that traditional equitable analysis is inappropriate when considering a request for injunctive relief brought under this section.\(^5\) Although the FTC must show a likelihood of success on the merits and a balance of equities in its favor, the traditional showing of irreparable injury is not required in order for the FTC to prevail.\(^5\) These requisites have been adopted, in form at least, by a majority of courts which have considered the issue.\(^9\) Notwithstanding the elimination of the irreparable harm requirement, the FTC has not uniformly prevailed under this test.\(^6\)

A major obstacle confronting the FTC has been its inability to gather sufficient data for preliminary hearings on the injunction to demonstrate a likelihood of success on the merits. The adoption of the Hart-Scott-Rodino Improvement Acts of 1976 has alleviated some of the difficulty.\(^2\) Yet, showing a likelihood of success on complex antitrust issues remains the most formidable of the elements to be satisfied.\(^3\)

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59. Id.

Injunctions have been granted to the FTC where courts apply tests differing from the traditional test. See FTC v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976) (court disregarded any private injuries alleged when balancing the equities); FTC v. Lancaster Colony Corp., 434 F.Supp. 1088 (S.D.N.Y. 1977) (court required only a "fair" chance of success on the merits).

62. 15 U.S.C. § 18 (a) (1976). The regulations became effective on September 7, 1978. 43 Fed. Reg. ¶ 36,054 (1978). These amendments provide for a complete pre-merger notification of the government by parties contemplating mergers, and were enacted in response to the inability of the government to halt anticompetitive mergers due to their lack of information. For further discussion of the requirements of these amendments, see Note, The Goal of the New Premerger Notification Requirements: Preliminary Relief Against Anticompetitive Mergers, 1979 DUKE UNIV. L.J. 249.

63. This heavy burden of proving a likelihood of success on the merits at the preliminary stages of the investigation has prompted the FTC to argue, albeit unsuccessfully, for a lea-
At least one district court has examined the legislative history of section 13(b) and concluded that the FTC need show "something less" than a probability of success.\textsuperscript{64} It merely required the FTC to show "a fair and tenable chance of success" on the merits.\textsuperscript{65} Although this test appears on its face to be more lenient, it has not proven to be an easier test for the FTC to satisfy.\textsuperscript{66}

The alternative Sonesta test developed in the Second Circuit has also been applied to FTC actions.\textsuperscript{67} The FTC then must show only "serious and substantial questions going to the merits" and a balance of equities in its favor. The nature and complexity of antitrust litigation necessarily involves judicial evaluation of relevant product markets, lines of competition and anticompetitive effects. It is rare where serious and substantial questions are not presented at the preliminary hearing. Consequently, the FTC has uniformly prevailed on this section of the test.\textsuperscript{68}

Required Showing on the Equities

Assuming the FTC has been able to satisfy the required showing on the merits, the agency still must balance the public and private equities in its favor. The public interest in preservation of a competitive market consistently carries great weight in balancing the equities and often outweighs private interests involved.\textsuperscript{69} Characterizing of that burden, provided there is a strong showing on the equities. FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977).

\textsuperscript{64} FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977). Suit was brought to enjoin the merger of a manufacturer of machine pressed glass and a manufacturer of machine blown glass. The court relied on the legislative history of § 13 (b) to support its conclusion that public interest carried the greatest weight in evaluating this request for an injunction; only a fair and tenable chance of success was required to supplement this showing. The injunction was granted.

\textsuperscript{65} Id. at 1090.

\textsuperscript{66} Injunctions were denied using this test in both FTC v. Beatrice Foods Co., 1978-2 Trade Cas. ¶ 62,148 (D.D.C. 1978), and FTC v. Southland, 471 F. Supp. 1 (D.D.C. 1979). The Southland court found that only a de minimus anticompetitive effect was shown, which was insufficient to satisfy even the fair and tenable standard. This test has been specifically rejected in FTC v. Tenneco, Inc., 433 F. Supp. 105 (D.D.C. 1977). See also FTC v. British Oxygen, 529 F.2d 196 (3d Cir. 1976); FTC v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976); FTC v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1976).

\textsuperscript{67} See, e.g., FTC v. National Tea Co., 603 F.2d 694 (8th Cir. 1979); FTC v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1978).

\textsuperscript{68} See FTC v. Nat'l Tea Co., 603 F.2d 694 (8th Cir. 1979) (preliminary injunction denied based on failure to balance equities in favor of the FTC); FTC v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1978) (preliminary injunction granted).

terization of the public interest, however, is often determinative of this result. Where the public interest is characterized as preservation of a competitive economy, private interests must be substantial to outweigh the public interest inherent in any enforcement of the antitrust laws.\textsuperscript{70} Where public interests are more narrowly defined, however, to exclude traditional considerations of anticompetitive effect, the private interests may prevail. In \textit{FTC v. Exxon Corporation},\textsuperscript{71} for example, the FTC sought to bar the acquisition by Exxon of a company that manufactured a component critical to Exxon's energy development program. The court defined the public interest as the production of energy at maximum efficiency and at a significant savings, and therefore compatible with the private interest in the merger.\textsuperscript{72} Although most courts feel that the public interest is best served by preservation of a competitive marketplace, they will not include increased efficiency, economic hardship,\textsuperscript{73} or delivery of a product at a lower price as being in the public interest.\textsuperscript{74}

The Fourth Circuit proposed an extremely favorable test on the equities for the FTC in \textit{FTC v. Food Town Stores, Inc.}\textsuperscript{75} Although

\textsuperscript{70} See, e.g., \textit{FTC v. Nat'l Tea Co.}, 603 F.2d 694 (8th Cir. 1979)(public interest was outweighed by the imminent failure of one of the merging companies).

\textsuperscript{71} 1979-2 Trade Cas. ¶ 62,763 (D.D.C. 1979).

\textsuperscript{72} The court defined the public interest as follows:

\begin{quote}
The antitrust laws are not, after all, ends in themselves, but only means to the end of serving the public interest. That public interest would seem to lie in this instance in the development and distribution of improved electrical equipment that is capable of manufacture and sale at low cost and that—in the midst of the present energy crisis—may be operated with maximum efficiency and with significant savings in energy.
\end{quote}


\textsuperscript{73} But see \textit{FTC v. Nat'l Tea Co.}, 603 F.2d 694 (8th Cir. 1979), where the court denied a preliminary injunction as being in the public interest where the acquired company's potential failure was imminent, and was certain to occur if the merger was enjoined. For further discussion of the case see 65 \textit{Cornell L. Rev.} 438 (1980).

\textsuperscript{74} The Supreme Court stated this view most forcefully in \textit{United States v. Philadelphia Nat'l Bank}, 374 U.S. 321 (1963):

\begin{quote}
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.
\end{quote}

\textit{Id.} at 371.

\textsuperscript{75} 539 F.2d 1339 (4th Cir. 1976).
the court adopted the traditional likelihood of success standard in its evaluation of the merits, it departed from the traditional approach in balancing the public and private equities. Instead of weighing public equities against private equities, the court concluded that Congress had intended to exclude consideration of any private equities put forth by defendants.76 Using this approach, the FTC need only show a potential threat to the public interest. This requirement could be easily satisfied by the ubiquitous threat of anticompetitive effect. Courts which have followed this approach have granted the FTC preliminary injunctions regardless of the standard the FTC was required to meet on the merits.77

It is doubtful Congress intended such an extreme result. Indeed, Congress entrusted the district courts with the task of evaluating each request for a preliminary injunction. The courts are accorded much discretion in their analysis, which is appropriate given the uniqueness and complexity of each situation. Excluding consideration of private harm predisposes the court towards granting an injunction to such a degree that it, in effect, leaves the court no discretion at all. The legislative history indicates that, more likely, Congressional intent was to dramatize the public interests involved. This emphasis is appropriate in light of the FTC's responsibility to prohibit unfair methods of competition.78

Department of Justice

The Department of Justice is empowered to prevent and restrain violations of section 7 of the Clayton Act.79 The mechanism for enforcement is section 15 of the Clayton Act,80 which provides that

76. The court rationalized that many private harms would result from enjoining any merger, yet Congress' authorization of injunctive relief indicated that little weight should be given to them. 539 F.2d 1346. Among the private harms alleged which were given no weight were: possible abandonment of the merger; the possible subjection of the target company to lawsuits by creditors and shareholders; a loss in personnel due to the uncertainty occasioned by the suit; and the acquired company's urgent need to arrange substantial new financing on short notice if the merger was delayed. Id. at 1345.


"[p]ending hearing and determination of the case the court may at any time make such temporary restraining order[s] or prohibition[s] as shall be deemed just." Various tests have been applied to requests for preliminary injunctive relief. Generally, however, the government is usually required to show a reasonable probability of success on the merits. While some courts require only that limited showing, most, in addition, require a showing of irreparable harm and a balancing of the equities in favor of the public interest.

Required Showing on the Merits

The Justice Department has experienced the same difficulties in showing a likelihood of success on the merits as has the FTC. Whereas some courts have relieved the FTC of some of its burden of proof by only requiring that the substantial questions test be met, this test has received limited application in cases brought by


81. 15 U.S.C. § 25 (1976). The Department of Justice and the Federal Trade Commission have concurrent power to enforce the antitrust laws. To avoid unnecessary duplication of effort, the two agencies work closely together. II P. AREEDA & D. TURNER, ANTITRUST LAW § 305(c) (1978).


the Justice Department. Likewise, the test of "fair and tenable" measure of success has never been applied to a Justice Department action. In contrast to the FTC, the legislative history of section 15 has not been interpreted to permit the application of a non-traditional standard. Consequently, the majority of courts hold the Justice Department to the traditional equitable standard requiring a showing of likelihood of success on the merits.

Preliminary injunctions sought by the Justice Department are also frequently denied because of failure to demonstrate irreparable harm. Frequently the underlying reason for this conclusion is that divestiture is seen as a feasible alternative. Courts recognizing the inherent complexities of the divestiture remedy, however, have not allowed it to rebut the government's showing of irreparable harm.

**Required Showing on the Equities**

After showing a probability of success on the merits and the likelihood of irreparable harm, the government must balance the equities in its favor. Despite the availability of divestiture, the presumption that the public interest is harmed by even temporary anticompetitive situations remains strong. For example, the district

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85. This test was applied in United States v. Parents Magazine, 1962 Trade Cas. ¶ 70,437 (N.D. Ill. 1962).
86. See text accompanying notes 64-66 supra.
court in *United States v. Atlantic Richfield Co.*[^91] considered defendant's potential injuries, yet concluded that "they cannot outweigh the public interest in preventing this merger from taking effect. . . . The public interest with which Congress was concerned in enacting Section 7 is paramount."[^92] The Third Circuit similarly affirmed a case where the trial court held that "the public interest in preserving a competitive economy cannot be outweighed by any private interest."[^93] Nevertheless, this presumption in favor of the government may be successfully rebutted.

The public interest, arguably, will be served equally well by either a hold-separate order or an order of divestiture. Predictably, denials of preliminary injunctions are often accompanied by hold-separate orders, or denied with the knowledge that divestiture will remain as a form of relief after determination of the antitrust violation[^94]. The hold-separate order, however, has been criticized as being as ineffective as divestiture[^95]. The availability of a hold-separate order has been accorded varying weight in the balance of equities. It has been held that granting a hold-separate order is "bad policy", in contravention of the national interest in preventing antitrust violations.[^96] Other courts have held the availability of a hold-separate order to be of significant value when balancing the equities[^97].

Consideration of the availability of a hold-separate order was carried to its extreme in *United States v. International Telegraph & Telephone Co.*,[^98] where the viability of a hold-separate order was evaluated as a distinct element of the analysis of the injunction request, rather than as a factor incorporated in the equitable portion of the traditional test. The court reasoned that the availa-

[^92]: Id. at 1074.
bility of a hold-separate order would presumably serve the public interest by preserving the status quo pending decision of the case on the merits. Yet, such an order would not be so drastic a remedy as to precipitate abandonment of merger plans. 99 While most courts consider the availability of a hold-separate order when balancing the equities, few have followed this court by according it status as a less restrictive alternative to the preliminary injunction. 100

Another consideration which may rebut the government's showing on the equities is economic hardship of the defendant. Enjoining any merger inevitably results in some economic misfortune, if only the expense of litigating the alleged violation. Where an injunction would likely cause the defendant's financial failure, however, courts have occasionally found the balance of equities to weigh in favor of the defendant, and have allowed the merger to proceed. 101 Threatened abandonment of a merger is also given considerable weight in balancing the equities where the government is seeking relief. 102

In sum, the Department of Justice must meet a more stringent standard in seeking preliminary relief than that required of the Federal Trade Commission. The unique legislative history of section 13(b) of the FTC Act, which has enabled the FTC to circumvent the traditional equitable test, is inapplicable to suits brought by the Department of Justice under section 15 of the Clayton Act. 103 Unlike the FTC, the Justice Department is not relieved of the necessity of showing irreparable harm; 104 nor does it enjoy the more flexible standards for showing success on the merits accorded

99. Id. at 798.
100. The test was followed, however, in United States v. Wachovia, 313 F. Supp. 632 (W.D.N.C. 1970)(proposed acquisition by a bank of a finance company). See also United States v. Culbro Corp., 436 F. Supp. 746 (S.D.N.Y. 1977)(proposed merger of cigar manufacturers). Injunctions were denied in both cases.
101. Economic hardship, however, was not sufficient to balance the equities in defendant's favor in United States v. Coca Cola Bottling Co. of L.A., 575 F.2d 222 (9th Cir. 1978), cert. denied sub nom., Aqua Media v. United States, 439 U.S. 959 (1980), where the injunction was issued to preserve the possibility of rescission despite the fact that over two million dollars of the purchase price had been distributed to the shareholders.
103. See text accompanying notes 64-66 supra.
104. See text accompanying notes 58-59 supra.
to the FTC. Where private equities have been ignored in FTC cases, the same courts have failed to apply this approach to cases filed by the Justice Department. These different standards of analysis seem incongruous. Varying standards for two government agencies entrusted with enforcement of the same antitrust laws serves no apparent policy. A quirk of legislative history should not be allowed to undermine the government's interest in preserving a competitive economy through uniform enforcement of the antitrust laws.

**Private Enforcement**

Effective antitrust enforcement commands considerable time and resources. Private antitrust enforcement supplies a supplement to government efforts. Private parties are authorized by section 16 of the Clayton Act to seek injunctive relief "against threatened loss or damage by a violation of the antitrust laws. . . ." This relief is to be granted in accordance with traditional equitable principles. Consequently, an injunction should issue only where the danger of irreparable loss or injury is immediate. Furthermore, private parties are required to establish a unique private injury; assertion of a threatened public harm is an insufficient basis for injunctive relief. Anticompetitive effects that will not directly harm a private plaintiff are beyond the reach of a private action for injunctive relief.

Courts originally welcomed private party participation in antitrust enforcement, encouraging private plaintiffs to assume the role of a "private attorney general." Currently, however, suits by private plaintiffs are met with increasing skepticism about the ac-

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105. See text accompanying notes 64-66 supra.
106. See text accompanying notes 75-77 supra.
108. Id.
110. See Gulf & Western Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973), where the court recognized that

Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their capacities as investors or competitors, which incidentally benefit the general public interest, perform a vital public service.

tual motivations of such parties. The private plaintiff may be a competitor fearing a merger between two rivals, or it may be a supplier of raw materials fearing a vertical merger that would terminate its usefulness. Increasingly, the private plaintiff may be the target of an unfriendly takeover, seeking to prevent, or at least to delay, the takeover through any means possible. Courts fear spurious "strike suits" brought by takeover targets designed solely to raise the spectre of costly, time-consuming litigation to discourage the prospective acquirer. Costly delay is assured if a preliminary injunction is granted, and therefore frequently results in abandonment of the merger. Although the purpose of a preliminary injunction is merely to preserve the status quo pending full deliberation of the merits of the claim, courts increasingly are reluctant to grant an injunction, the effect of which is often the same as an affirmative finding of an antitrust violation.

**Required Showing on the Merits**

The traditional and most widely used test for evaluation of a private party request for an injunction requires the plaintiff to show a likelihood of success on the merits and a danger of immediate irreparable harm. In cases utilizing the traditional standard of review, the determination of a likelihood of success on the merits is a critical factor. The plaintiff's ability to prevail on this element depends primarily upon the unique circumstances of the case and its ability to document an antitrust violation.

The alternate *Sonesta* test, requiring a showing of serious and substantial questions going to the merits and a balancing of the equities in favor of the plaintiff, has received its widest application.

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111. See generally, Note, Target Company Defensive Tactics Under Section 7 of the Clayton Act, 4 Conn. L. Rev. 352 (1971).

112. The threat of abandonment of the merger was given great weight in Missouri-Portland Cement Co. v. Cargill, 498 F.2d 851 (2d Cir. 1974), cert. denied, 419 U.S. 883; See also Crane Fruehauf, Ltd. v. Fruehauf Corp., 1972 Trade Cas. ¶ 72,885 (S.D.N.Y. 1977). Both courts denied the requests for preliminary relief.


114. See notes 17-19 supra and accompanying text.

115. For a general discussion of the difficulties plaintiffs may face in proving an antitrust violation, see Antitrust Adviser §§ 3.21-3.36 (2d ed. C. Hills ed. 1978).
in cases involving private plaintiffs.\textsuperscript{116} Private plaintiffs in jurisdictions using this test have usually succeeded in showing serious and substantial questions going to the merits.\textsuperscript{117} The Second Circuit, which originated this test, has suggested, however, a stricter standard of proof for private parties attempting to block a takeover attempt with a preliminary injunction. In \textit{Missouri Portland Cement Co. v. Cargill, Inc.}\textsuperscript{118} the court characterized plaintiff's use of the preliminary injunction as "[d]rawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer."\textsuperscript{119} Comparing the use of this form of equitable relief to a private weapon, the court concluded that the intention of the framers of section 16 was not to allow "incumbent management of a target company . . . power to block free trade in its securities unless the anti-trust violation was fairly clear or the potential damage to the corporation decisively outweighed that to the would-be acquirer."\textsuperscript{120} This caveat to the \textit{Sonesta} test, then, requires a convincing showing of an antitrust violation. The Second Circuit's decision seemed to emphasize the conglomerate nature of the merger when denying the injunction.\textsuperscript{121} It is not clear, however, that the court intended the takeover target test to be limited to

\begin{footnotes}

\item[117] \textit{Id.}


\item[119] \textit{Id.} at 854. The court continues:

The target company typically hopes to obtain a temporary injunction which may frustrate the acquisitions since the offering company may well decline the expensive gambit of a trial, or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown.

\textit{Id.}

\item[120] \textit{Id.} at 870. (emphasis added).

\item[121] The opinion proposed

Where, as here, the acquisition would be neither horizontal nor vertical, there are 'strong reasons for not making the prohibitions of section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are procompetitive in their facilitation of entry and expansion that would otherwise be subject to serious handicaps.' [quoting from Turner, \textit{supra}, note 5 at 1318].

\textit{Id.} at 854. The FTC subsequently filed a complaint challenging this acquisition, and Cargill withdrew its offer. 1 ABA \textit{Antitrust Section, Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act—Policy and Law} 38, n.145 (1977), [hereinafter cited as ABA Monograph].
\end{footnotes}
conglomerate mergers.122 To the contrary, that test subsequently has been applied to deny preliminary injunctions in cases involving a horizontal merger,123 a merger with both horizontal and vertical effects,124 and a merger with horizontal, vertical, and conglomerate elements.125 It is significant that this stricter standard for takeover targets developed in the Second Circuit, the source of the arguably more lenient standard of “serious and substantial questions.”126

Another factor which may influence the court’s finding on the plaintiff’s likelihood of success on the merits is the effect of government action, or inaction. The Justice Department has merger guidelines which generally indicate when the department will challenge a planned merger.127 The Justice Department also issues business letters, stating its intention not to challenge a merger.128 Although the FTC has not developed comprehensive guidelines, it has investigated industries in certain markets and has indicated its policies for each industry.129 Although some courts discount any government proclamations, others perceive the government’s guidelines as indicative of the plaintiff’s ability to demonstrate a likelihood of success on the merits.130

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122. The court initiated its discussion by emphasizing the importance of identifying what harm exists where there is neither a vertical nor horizontal acquisition. 498 F.2d at 854. Yet, the court’s conclusion emphasized the threatened abandonment of the merger and the target company’s private motives, without referring to the nature of the merger. 498 F.2d at 870.


126. The Second Circuit cited the Sonesta test, but found that Missouri-Portland plaintiffs were unable to show a clear violation of antitrust law sufficient to satisfy the traditional test; nor were they able to balance the equities in their favor under the Sonesta test. Missouri-Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 867 (2d Cir.), cert. denied, 419 U.S. 883 (1974).

127. 1 CCH TRADE REG. REP. ¶ 4510 (1968).

128. ABA MONOGRAPH, supra note 121, at 26-28.

129. Id.

Required Showing of Irreparable Harm

Traditionally, in addition to a showing on the merits, private plaintiffs must also show irreparable harm.\textsuperscript{131} Although irreparable harm is not an express component of the \textit{Sonesta} test, a showing of irreparable harm is considered implicit in balancing the equities.\textsuperscript{132} Where the private plaintiff is not the target of a takeover, general anticompetitive effects, such as loss of market share, may comprise irreparable harm. Takeover targets, however, will not suffer competitively as the result of their takeover. Therefore, elements of irreparable harm must be found elsewhere.

Takeover targets have successfully asserted irreparable harm by showing the adverse effects of the proposed takeover on employee recruitment, company morale, individual performance, and customer relationships.\textsuperscript{133} One court found irreparable harm upon evidence that the takeover target's ability to obtain equity and debt financing would be impaired; the value of the stock of the target would be depressed; the company would have difficulty retaining management; the labor force would be demoralized; and stockholders therefore would tender their stock to the detriment of the status quo and the public interest.\textsuperscript{134} Conversely, the plaintiff deprecated irreparable harm to the acquiring company as the mere loss of a business opportunity to acquire control of a competitor.\textsuperscript{135} Another court used an equally broad approach to find irreparable harm in the use of executive time spent resisting the target offer; the adverse effect upon salesmen's performance in the field; the lack of customer confidence; the acquiring company's access to confidential business records; and the adverse effect on employee morale.\textsuperscript{136} Companies also have asserted as irreparable harm the loss of other, possibly more profitable, opportunities to sell the company; the difficulty management may experience in selling the

\textsuperscript{131} See text accompanying note 9 \textit{supra}.
\textsuperscript{132} Triebewassar \& Katz v. A. T. \& T. Co., 535 F.2d 1356 (2d Cir. 1976).
\textsuperscript{133} \textit{See}, e.g., Gulf \& W. Indus., Inc. v. Great Atl. \& Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973)(recognizing the adverse effect of takeover threat on executive morale as irreparable harm). \textit{But see} Missouri-Portland Cement Co. v. Cargill, Inc., 496 F.2d 851 (2d Cir.), cert. denied, 419 U.S. 883 (1974) (the court criticized inclusion of executive morale as a subject for irreparable harm); Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D.Pa. 1975)(where the court rejected the intervenor-AFL-CIO's argument that a merger resulting in a Paris-based corporation would strain labor relationships, thereby causing irreparable harm).
\textsuperscript{134} 1977-2 Trade Cas. ¶ 61,793 (D. Md. 1976).
\textsuperscript{135} Id. at 73-264.
company after being subject to intensive scrutiny by the court; and the unwillingness of management, pending resolution of the takeover attempt, to make long-term capital investments necessary to realize maximum earnings. A countervailing factor to the target company's showing of irreparable harm, however, is the shareholder's right to sell his property in the marketplace in response to a tender offer. This factor may even be considered the paramount interest requiring protection by the court. This rationale is vulnerable, however, to plaintiff's argument that the shareholder only holds that right if the acquisition is lawful, and therefore it cannot be a factor used to determine that legality.

Finally, it should be noted that the ultimate remedies available to private parties differ significantly from those available to the government. Courts are split on the availability of divestiture as a private remedy. The government may also seek relief in the form of spin-off of the acquired corporation, establishment of a new company, banning of further acquisitions by the takeover company, or compulsory assistance to the purchaser of divested property, including use of patents, trademarks, and tradenames. The unavailability of divestiture and related remedies should weigh in favor of private plaintiffs. If preliminary injunctive relief is denied, and an antitrust violation is subsequently found, the private party may not be able to obtain effective relief. Courts, however, have found the availability of hold-separate orders to be an adequate substitute for the remedy of divestiture.

139. That argument balanced the equities against the shareholder in Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973), where the court found the "probability that the investment is unlawful . . . is sufficiently strong to call into serious question G & W's right to proceed with the tender offer." Id. at 698. Chemetron Corp. v. Crane Co., 1977-2 Trade Cas ¶ 61,717 (N.D. Ill. 1977); Elco Corp. v. Microdot, Inc., 360 F. Supp. 741 (D. Del 1973).
141. See note 16 supra and accompanying text.
142. Id. While rescission of a merger agreement has not yet been granted in a private suit, it has been ordered in a government suit. United States v. Coca Cola Bottling Co. of L.A., 575 F.2d 222 (9th Cir. 1978), cert. denied sub nom., Aqua Media v. United States, 439 U.S. 959 (1980). See generally Note, Section 7 Clayton Act Remedies—The Rescission Decision, 64 CORNELL L. REV. 736 (1979).
143. See, e.g., Carrier Corp. v. United Technologies, 1978-2 Trade Cas. ¶ 62,393 (N.D.N.Y.), aff'd, 1978-2 Trade Cas. ¶ 62,405 (2d Cir. 1978); ICM Realty v. Cabot, Cabot & Forbes Land Trust, 378 F. Supp. 918 (S.D.N.Y. 1974). See also Anaconda Co. v. Crane Co., 411 F. Supp. 1210 (S.D.N.Y. 1975), where a hold-separate order was not issued, since the acquirer set up a separate subsidiary solely for the purpose of absorbing the acquired com-
A Proposal For a Uniform Test

The analysis used to evaluate requests to preliminarily enjoin mergers varies with the nature of the plaintiff. The Federal Trade Commission usually is required to show a likelihood of success on the merits, and a balance of equities in its favor. The Department of Justice normally must show a likelihood of success on the merits, a balance of equities in its favor, and potential irreparable harm. Private parties most often are evaluated according to traditional equitable standards. Courts which have adopted the Sonesta test, on the other hand, require only a balancing of the equities in the plaintiff's favor and a showing of serious and substantial questions going to the merits.

This variation in standards of analysis has yielded anomalous results in antitrust litigation. The FTC and the Justice Department are both entrusted with preservation of a free marketplace. Yet, the two agencies are subject to different standards of proof when they attempt to enforce the antitrust laws by requesting a preliminary injunction. The FTC may be able to obtain a preliminary injunction where the Justice Department, under the same facts, will fail. Furthermore, whether the plaintiff is a government or private party, each has difficulty producing sufficient data at a preliminary hearing to demonstrate a likelihood of success on the merits. Material submitted under the pre-merger notification program does provide considerable assistance to the government in making its showing. The private plaintiff, however, does not benefit from this

144. See text accompanying notes 56-59 supra.
145. See text accompanying notes 79-82 supra.
146. See text accompanying note 112 supra.
147. See text accompanying notes 26-32 supra.
148. The FTC and Justice Department recently reported positive results after the first year of pre-merger notification. 945 ANTITRUST & TRADE REG. REP. (BNA) A-21 (Jan. 30, 1980). They suggested that companies have become more cautious of the Clayton Act. During the first 11 months of the program, 814 transactions were filed. Of these, the government sought more information in 95 cases, resulting in the FTC's attempt to enjoin three mergers, and the Justice Department's attempt to enjoin six. A "number of transactions" were abandoned after receiving official interest. Their report concludes that:

[T]he Act provides significant benefits to competition by improving the ability of agencies to discover, investigate and challenge anticompetitive transactions but it is not a panacea. Its utility should not be judged solely by reference to the number of injunctions successfully obtained by the enforcement agencies under its provisions.
program, and nevertheless is often held to the same showing on the merits.

Adoption of the *Sonesta* test for all actions brought to enjoin mergers would be a reasonable and progressive solution to this needless array of legal standards.\(^{149}\) This would eliminate the irrational disparity between the burden of proof required of the Justice Department and that required of the FTC. The flexibility of the *Sonesta* test would allow the courts to balance the equities where the plaintiff, whether the FTC, the Justice Department, or a private party can demonstrate serious and substantial questions on the merits. A plaintiff who might otherwise be denied injunctive relief due to failure to show a likelihood of success on the merits, might still prevail where this deficiency on the merits could be offset by a strong showing on the equities.

Where the government can meet the burden of showing a likelihood of success on the merits, the traditional test may be an effective analytical tool. The current pre-notification program considerably assists the government with this task.\(^{150}\) Notwithstanding this program however, the government still may be unable to meet the traditional standard. The flexibility of the Sonesta test would allow such a deficiency on the merits to be offset by a showing of strong public interest in preserving competition. This test, however, would not automatically balance the analysis in the government’s favor. The defendant in a government suit would prevail where the equities tip in its favor.

The analysis of private party suits similarly would be enhanced by uniform application of the *Sonesta* test. Where the private plaintiff could not show a likelihood of success on the merits, the *Sonesta* test would offer a logical alternative. The private equities of the plaintiff and defendant could be carefully weighed by the court, thus according equal protection to the interests of both par-

\(^{149}\) Id. at A-21.

\(^{150}\) Id. at 114.

See note 62 *supra* and accompanying text.
ties. The Sonesta test also appropriately considers whether the private party is a takeover target. Contrary to traditional antitrust enforcement the private takeover plaintiff is seeking to protect purely private interests. Confining the balance of equities solely to examining private equities prevents a private plaintiff from wielding the “national interest” as a weapon in its litigation arsenal. In this way, Sonesta properly focuses the court’s analysis. Sonesta therefore presents the dual advantage of allowing maximum protection in face of an alleged antitrust violation by virtue of the flexibility of the test, while not limiting the discretion of the court to consider the motivation and interests of the plaintiff.

CONCLUSION

The unique nature and complexity of antitrust litigation demands a unique test to properly evaluate requests for preliminary injunctions to restrain possible antitrust violations. That test is the Sonesta test. It offers a flexible analysis to complement, or better yet replace, traditional equitable analysis. Antitrust laws express a fundamental national policy of preserving competition in the marketplace. This policy demands optimum protection. Adoption of the Sonesta test would give courts the greatest ability to protect competition in the marketplace.

PATRICIA NEEDHAM MARUCCI

151. See note 118 supra and accompanying text.