



# Raising Antitrust Merger Challenges

Third-party Strategies

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Customers, competitors and other third parties opposed to a potential transaction in their industry can take proactive steps to challenge the transaction, such as encouraging the investigating federal antitrust agency to block it, filing a private civil suit or even lobbying Congress.

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**S**ection 7 of the Clayton Antitrust Act (Clayton Act) prohibits mergers, acquisitions and certain joint ventures that substantially lessen competition in any line of commerce or activity affecting commerce in the US (15 U.S.C. § 18). Typically, mergers between horizontal competitors run the most antitrust risk. However, certain vertical mergers (those between entities at different levels of the supply chain) may also cause competitive concerns.

The Clayton Act can be enforced by:

- The federal antitrust agencies, made up of both:
  - the Antitrust Division of the Department of Justice (DOJ); and
  - the Federal Trade Commission (FTC).
- State attorneys general.
- Private third parties, including advocacy groups active in the relevant industry or one (or both) of the transacting party's:
  - customers;
  - competitors;
  - suppliers;
  - distributors; or
  - wholesalers.

Third parties opposed to a potential transaction in their industry can take actions to challenge the transaction under the Clayton Act, either independently or by leveraging federal or state antitrust enforcers. Merging parties should always be prepared for third-party opposition, while third parties seeking to intervene should weigh the potential benefits against the hazards. These include, for example, the risk that information provided to the antitrust agencies during a merger review later becomes available to the merging parties or to the public (see below *Potential Risks of Complaining to the Agencies*).

This article explains how third parties can oppose a transaction under the antitrust laws, including by:

- Complaining to the federal antitrust agencies.
- Independently filing suit against the merging parties.
- Complaining to state attorneys general.
- Lobbying Congress with the support of consumer advocacy groups.
- Enlisting the help of industry experts.

## COMPLAINING TO THE FEDERAL AGENCIES

In the merger review process, input from third parties can play a significant role by:

- Influencing the antitrust agencies to investigate particular aspects of a transaction.

Of all third-party complaints, customer complaints typically carry the most weight with the agencies.

- Encouraging the antitrust agencies to make a formal legal challenge.
- Helping the antitrust agencies shape an eventual merger remedy.

Third-party input is also important when a transaction does not trigger the premerger notification process, but nonetheless raises competitive concerns. This is often the way in which the antitrust agencies learn about these transactions. The agencies have jurisdiction to review transactions even if they are:

- Not reportable under the premerger notification process.
- Already consummated.

Of all third-party complaints, customer complaints typically carry the most weight with the agencies. A report filed by the FTC that reviews certain merger investigations between 1996 and 2011 indicates that the FTC is about twice as likely to challenge a deal when the transacting parties' customers have credible and significant anticompetitive concerns about the deal than when strong customer complaints do not exist (*FTC: Horizontal Merger Investigation Data Report (January 2013)*). While customer complaints are given the most weight, competitors and other third parties can still make their concerns known to the antitrust agencies during the merger review process.

In preparing to complain to the federal agencies, third parties should consider:

- How the agencies analyze the competitive effects of a transaction.
- Who to contact at the agencies, when to contact them and what information to provide.
- Whether to seek to obtain the merging parties' divested assets.

- The challenges faced by complaining competitors and other third parties.
- The potential risks of complaining to the agencies.

### THE MERGER REVIEW PROCESS

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR), merging parties must file with both the FTC and the DOJ prior to closing when a merger exceeds certain statutory reporting requirements.

Once an HSR filing is received for a transaction that raises competitive issues, the FTC and the DOJ decide which agency will review the transaction. Because they have concurrent jurisdiction to review mergers, the FTC and the DOJ must undergo a clearance process to allocate merger review of a particular deal between them to avoid duplication and inefficiencies.

>> For more information on the HSR notification requirements and the allocation of cases between the FTC and the DOJ, search [Hart-Scott-Rodino Act: Overview](#) on our website.

The reviewing agency must analyze the competitive effects of a merger during the initial waiting period (typically 30 days), including by:

- Identifying overlaps in the products or services that are offered by the merging parties.
- Defining relevant product and geographic markets.
- Identifying relevant players in the relevant markets.
- Estimating pre- and post-transaction market shares and concentration.
- Evaluating the competitive dynamics of the relevant industry.

>> For more information on how the antitrust agencies analyze the competitive effects of a merger, search [How Antitrust Agencies Analyze M&A and Analyzing a Relevant Market in Horizontal Mergers](#) on our website.

Towards the end of the initial waiting period, the agency must determine whether it should issue a request for additional information (known as a Second Request). Ultimately, the agency must determine whether any competitive concerns can be addressed through a settlement or whether to challenge the transaction in court if no settlement is reached.

Because of the burdens and time constraints associated with merger investigations, the agencies typically welcome third-party input and often reach out to competitors, customers and other industry participants for information about competition in the relevant market.

>> For more information on the merger review process, search [Corporate Transactions and Merger Control: Overview](#) on our website.

#### PRACTICE NOTES

The following related Practice Notes can be found on [practicalaw.com](#)

>> Simply search the title OR resource number

[How Antitrust Agencies Analyze M&A or 3-383-7854](#)

[Merger Remedies or 6-521-6515](#)

[Antitrust Standing of Private Plaintiffs or 2-519-7509](#)

[Private Antitrust Actions or 8-500-4348](#)

### CONTACTING THE FEDERAL AGENCIES

Third parties may either wait to be contacted by the reviewing federal antitrust agency during the merger review process or proactively contact the agency to complain about a merger.

#### Who Should Be Contacted?

The HSR filing process is confidential. Therefore, unless the parties publicly announce their acquisition, third parties may not know whether an HSR filing has been submitted or whether an agency has been cleared to review the transaction.

However, third parties can take steps to identify and contact agency staff if the identity of the reviewing agency can be discerned based on which agency (and which shop within that agency) typically reviews mergers in the relevant industry. For example, mergers in the airline and wireless telecommunications industries are typically reviewed by the DOJ, while mergers involving hospitals and pharmaceutical companies are typically reviewed by the FTC. In these circumstances, counsel for the third party should contact the appropriate DOJ Section Chief or FTC Assistant Director responsible for reviewing mergers in that industry.

Where it is unclear which agency will review a particular merger, counsel for the third party should call either:

- The premerger notification offices (PNOs) of each agency.
- A contact at either of the antitrust agencies, such as an agency staff attorney with whom counsel has worked before.

If an HSR filing was made and the transaction has already been cleared to the FTC or the DOJ for review, counsel will be referred to the appropriate staff attorney. If no HSR filing was made, or if the agencies have not yet determined clearance, counsel for the third party should contact both agencies and present the same substantive case to each.

In any event, counsel should initiate an informal dialogue with the appropriate agency staff before making any formal presentation or submitting any written analysis. This will help ensure that the agency understands the third party's position and has a sense of what to expect. Importantly, it may also provide insight into what issues the agency is most interested in discussing so that the third party and its counsel can focus their efforts on those issues. After establishing a dialogue, the

In addition to complaining about the competitive effects of a transaction, competitors and other third parties often contact the agencies as part of a strategy to obtain the merging parties' divested assets.

third party and its counsel can make a more formal submission or presentation.

#### **When Should the Agencies Be Contacted?**

Third parties should contact the agencies as early in the process as possible. Early involvement can help set the tone for the investigation, including what the agency views as key issues and whom the agency approaches for information. As the investigation progresses, the agency's views take shape and it becomes more difficult to persuade the agency to pursue new theories. Although early intervention is preferred, it is never too late to provide input.

#### **What Information Should Be Provided?**

Notwithstanding the benefits of early intervention, a complaining third party should not sacrifice thorough preparation and factual development for speed. General, vague or unsupported complaints are neither persuasive nor helpful. The agencies are most receptive to focused and credible facts, supported by documentary evidence that shows how the merger might harm competition, such as:

- Internal documents, particularly those created in the ordinary course of business.
- Third-party studies, including those done by or for an industry trade association.
- Pricing analyses.
- Market research studies.
- Product brochures or videos.
- Customer surveys.

Information generated by the third party in the ordinary course of business and before the announcement of a proposed transaction is generally given more weight than materials created specifically to challenge the merger.

Face-to-face meetings between agency staff and company representatives that have first-hand knowledge of the relevant industry, products, and associated documents and data can also help the staff form their views with greater confidence. Agency staff generally prefer contact with business people that have direct knowledge of the relevant facts rather than with attorneys. If a proposed transaction poses a major concern to a third party, then bringing in the CEO or other knowledgeable senior executive can send a message to the agency that the company is serious about its concerns and committed to working closely with the agency. However, if someone further down in the organization is in a better position to address the relevant issues than the CEO, then it is better to bring in the most knowledgeable company representative.

Experienced antitrust counsel should meet with and prepare the company representative before the government meeting to review:

- Information that should be shared with agency staff.
- Questions that agency staff is likely to pose, including those related to:
  - the competitive effects of the acquisition;
  - documents and other information submitted by the third party; and
  - the third party's motive for complaining about the deal.

Third parties could also assist the agencies in the early stages of an investigation by identifying:

- Industry contacts.
- Other potential intervenors.
- Experts.
- Independent sources of industry data.

Third parties should also consider retaining a reputable economist, whose input can hold great weight with the agencies and assist staff. This is particularly helpful if the agency's economists express concerns regarding the transaction.

### OBTAINING DIVESTED ASSETS

In addition to complaining about the competitive effects of a transaction, competitors and other third parties often contact the agencies as part of a strategy to obtain the merging parties' divested assets. If an agency believes that a transaction raises competitive issues, it may decide to seek a remedy, such as a divestiture or license agreement, designed to allow the transaction to proceed while preserving competition at premerger levels.

Third parties can provide useful information to help shape merger remedies and provide greater confidence to agency staff that a particular remedy is viable. Third parties pursuing this strategy are sometimes able to acquire otherwise unobtainable assets belonging to the merging parties, such as production facilities, trademarks, databases and technology licenses, at highly discounted prices.

>> For more information on the types of remedies used by the antitrust agencies, search [Merger Remedies](#) on our website.

### CHALLENGES FACED BY COMPLAINING COMPETITORS

Antitrust agencies often presume that a competitor opposing a merger between its rivals is doing so because it fears increased competition. The 2010 Horizontal Merger Guidelines reflect this skepticism and note that the agencies typically do not rely on competitor complaints because their interests usually diverge from the interests of the consumer (*FTC: Horizontal Merger Guidelines* § 2.2.3 (Aug. 19, 2010)).

At the same time, the agencies acknowledge that competitors offer information on the relevant market and are particularly helpful in cases where a merger can result in exclusionary conduct (*FTC: Horizontal Merger Guidelines* § 2.2.3 (Aug. 19, 2010)). Competitors are generally well-placed to offer concrete, relevant and detailed facts that agency staff often find useful in developing theories and arguments. Competitors can also confirm information obtained by the agencies from other sources.

Because intervening competitors are often viewed skeptically by the agencies, a more effective strategy for competitors



may be to recruit a non-competitor third party with an interest in the transaction to complain. This could be a customer of the merging parties or a customer of both the complaining competitor and one of the merging parties. It may be challenging, however, to identify a customer willing to approach the agencies, particularly if the competitor itself has difficulty articulating the anticompetitive effects of the proposed transaction.

If a competitor decides to contact the agencies directly, it is most likely to be persuasive by using anecdotal and factual evidence demonstrating that the transaction is likely to harm consumers and competition. For example, a competitor can highlight that the merger is likely to stop the competitor from competing effectively against the merged entity by:

- Foreclosing the competitor from access to a necessary market or input.
- Foreclosing the competitor from specific and important market opportunities.
- Subjecting the competitor to higher costs.
- Subjecting the competitor to exclusionary conduct.
- Requiring vertical integration or multi-level entry.

Identifying this type of evidence and formulating persuasive arguments can also be more effective with the input of a reputable economist.

While the agencies are generally skeptical of competitor complaints, once an agency decides to oppose a transaction or seek substantial divestiture, a complaining competitor can be a valuable ally for the agency. Competitors can work closely with the agency to provide important support, particularly in connection with technical information where the competitor may have industry knowledge not available to the agencies. If the matter is litigated, the competitor can also help bolster the agencies' case and provide valuable trial assistance.

Competitor complaints suggesting that the merger will make it more difficult to compete with the merged entity because of resulting lower prices, more vigorous competition or greater innovation will not persuade the agencies that the transaction raises competitive concerns.

#### **CHALLENGES FACED BY OTHER THIRD PARTIES**

Non-competitor complaining third parties may also face skepticism from the agencies in some circumstances. For example, complaining wholesalers, suppliers or distributors of a target entity may be viewed by the agencies as being more concerned that the acquiring entity will prefer to do business with its own vendor rather than the target's vendor. The agencies tend to discount these complaints unless they address any lessening of competition resulting from the transaction.

#### **POTENTIAL RISKS OF COMPLAINING TO THE AGENCIES**

Before complaining to the agencies, third parties should carefully weigh the potential downsides.

##### **Confidentiality Concerns**

Submitted materials (even if marked and accepted as confidential) may later become subject to public disclosure. Voluntarily submitted third-party materials and testimony are not protected from disclosure by any statute or agency rule. While an agency is unlikely to disclose confidential information during an investigation, confidential material could become available to the merging parties (usually subject to a protective order) if the agency commences litigation to stop the transaction. The agency could also disclose the material to the public in response to a Freedom of Information Act request or to some other authority, such as Congress.

To address the risks of disclosure, a third party may proceed with one or more of the following:

- Asking the agency to allow the third party to submit its material in response to a Civil Investigative Demand (CID) or subpoena, both of which provide more confidentiality protections than submitting information voluntarily.
- Marking its submissions as "confidential."
- Requesting formal written assurance of confidentiality.

Notably, the agencies themselves are sensitive to confidentiality concerns and recognize that it is in their interest to protect confidential sources. However, if litigation ensues, a court will decide if submitted materials are subject to protection from disclosure.

##### **Time Away from Business**

A third-party complaint may require significant time commitments from company executives. Developing both a strategy and presentation, and preparing a submission to an agency, requires significant time and input from company executives. These executives should also expect to spend additional time if the agency has follow-up questions, issues CIDs or subpoenas, requires depositions or detailed affidavits, or requests additional documents. Additionally, a company may find its senior executives being called to testify as witnesses during litigation proceedings. Besides the time it takes to testify, executives will also spend time preparing with counsel.

##### **High Costs**

A third-party complaint can entail high costs. Once a third party submits a complaint, the agency may issue a CID or a subpoena in order to receive ordinary course business documents to support or disprove the third party's concerns. Responding to a CID can result in significant attorneys' and economists' fees and e-discovery costs.

## Lessening the Risk of Third-party Private Lawsuits: Merging Parties

For merging parties, private lawsuits are costly and disruptive, creating additional risk and uncertainty. Merging parties should be prepared for private litigation at any point in the process. They should also seek counsel and proactively take steps to try to prevent private litigation by:

- Effectively planning and implementing a comprehensive communications strategy promoting the benefits of the deal to third parties.
- Reaching out to individual third parties that may have unique or particularly sensitive concerns about the transaction.
- Renegotiating contract terms, such as extending the terms of a supply arrangement, to alleviate concerns of certain customers or suppliers.
- Avoiding the creation of bad documents that could provide evidence of likely anticompetitive effects.
- Avoiding post-merger conduct that is likely to prompt a private antitrust action, such as:
  - raising prices;
  - reducing output;
  - foreclosing rivals from a necessary input or market; and
  - raising rivals' costs.

### Unwanted Attention

A complaint could attract agency scrutiny toward the complaining third party or the broader industry in which the third party competes. The reviewing agency will have access to the third party's documents either voluntarily or through compulsory process. If the agency finds evidence of anticompetitive or other unlawful behavior on the part of the third party, then the third party may face an unwanted government investigation.

The third party can also draw unwanted public attention if it is drawn into litigation as a witness following a merger investigation.

### One-way Flow of Information

Agencies will not provide a complaining third party with information about the investigation. The third party should expect a high level of intrusiveness with no control over the process. For example, agency staff often:

- Do not disclose the status of the HSR waiting period.
- Are reluctant to reveal what areas of concern it has regarding the transaction or the seriousness of those concerns.

### Effects on Future Acquisitions

Submitted materials can later hurt the complaining third party. The antitrust agencies can use the arguments and information submitted by a third party in its opposition to a proposed merger against the third party in the future. For example, if the third party later seeks to pursue a merger, the agencies could use the third party's previous positions on market definition and entry to challenge the subsequent transaction.

## FILING SUIT INDEPENDENTLY

Third parties that are dissatisfied with the outcome of a government investigation may choose to directly challenge the transaction by independently filing a private, federal antitrust lawsuit. This can be done in addition to or instead of complaining to the antitrust agencies about the deal. A third-party lawsuit can be initiated after a deal is announced, during the merger review period, after a merger is cleared by the antitrust agencies or even after a merger has been consummated.

Private litigation is most likely to occur when:

- The transaction threatens a business relationship that is particularly valuable to a third party (such as a major supply source).
- The antitrust agencies clear the transaction with no remedies.
- The antitrust agencies seek relief that does not specifically address a third party's concerns.

From the third party's perspective, initiating a private civil suit can be costly in terms of financial resources and executive time (like participating in any other litigation).

Before deciding to file a civil suit, third parties should understand:

- The statutory basis for private antitrust actions and the availability of certain remedies.
- The standing requirements to bring an antitrust claim.
- The use of class actions.

>> For more information on the issues related to private enforcement of the antitrust laws, search [Private Antitrust Actions](#) on our website.



## COMPETITOR ANTITRUST STANDING: *SPRINT NEXTEL CORP. v. AT&T INC.*

In *Sprint Nextel Corp. v. AT&T Inc.*, the court examined whether two mobile wireless carriers, Sprint and Cellular South, had sufficiently alleged that they suffered or were likely to suffer antitrust injury as a result of AT&T's proposed \$39 billion acquisition of T-Mobile (821 F.Supp. 2d 308 (D.D.C. 2011)). In their suit, the plaintiffs claimed that, among other things:

- The merger would increase concentration in the market for wireless services and raise retail prices.
- Post-merger, AT&T would have greater purchasing power in the market for wireless devices (a key input for wireless service providers) and could force cutting-edge wireless device suppliers to:
  - enter exclusionary arrangements; and
  - stop selling to or dealing with smaller rivals like Sprint or Cellular South.

AT&T moved to dismiss the complaint on the grounds that the plaintiffs failed to allege antitrust injury and therefore lacked antitrust standing. The court:

- Dismissed the first claim because, as the US Supreme Court has long recognized, while higher prices and decreased output may harm customers, those effects benefit competitors by allowing them to also increase prices (*Sprint Nextel Corp.*, 821 F.Supp. 2d at 319).
- Denied AT&T's motion to dismiss the second claim, holding that the plaintiffs had alleged antitrust injury because foreclosing a competitor's access to a necessary input is the type of injury the antitrust laws were designed to prevent (*Sprint Nextel Corp.*, 821 F.Supp. 2d at 320).

In the face of a government enforcement action, a private suit and regulatory hurdles at the Federal Communications Commission, AT&T and T-Mobile subsequently abandoned their deal.

### STATUTORY BASIS FOR PRIVATE ANTITRUST ACTIONS

A private plaintiff may file suit under the antitrust laws if, as a result of an antitrust violation, it is either:

- Injured in its business or property (*Section 4 of the Clayton Act* (15 U.S.C. § 15(a))).
- Threatened by loss or damage (*Section 16 of the Clayton Act* (15 U.S.C. § 26)).

Depending on whether the private plaintiff has been injured or is threatened to be injured, it may seek:

- **A preliminary injunction.** Injunctive relief is available if a threatened harm can be shown. Proof of actual loss is not required. If a suit is initiated before the transaction is consummated, a plaintiff can likely only seek injunctive relief because it has not yet suffered harm.
- **Treble damages (three times its actual damages).** Damage awards are trebled in private antitrust actions (15 U.S.C. § 15(a)). If the transaction has already been consummated and a plaintiff has suffered lost sales as a result, the plaintiff may be able to collect damages.

- **Attorneys' fees.** A successful plaintiff is entitled to reasonable attorneys' fees whether the suit was for injunctive relief or for damages.

### ANTITRUST STANDING

Third-party private plaintiffs have the added difficulty of meeting the antitrust standing requirements in order to be permitted to bring suit.

To prove antitrust standing, a private plaintiff typically must meet a two-part test, showing that it:

- Has suffered an antitrust injury.
- Is an efficient enforcer of the antitrust laws.

### Antitrust Injury

Courts first consider whether the plaintiff has suffered an antitrust injury, which is an injury that the antitrust laws were intended to prevent and that results from a defendant's antitrust violation (*Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 447 (1977)). This requirement is meant to limit the availability of treble damages to appropriate plaintiffs, rather than to any party injured by the ripple effects of anticompetitive conduct.

# Meeting the antitrust injury prong of antitrust standing is difficult for competitors of the merging parties, as competitors are usually hurt by a more competitive, rather than a less competitive, market.

Courts therefore examine the alleged injury, the purpose of the antitrust laws creating the cause of action and the causal link between the two (*Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983)).

Customers can fairly easily establish antitrust injury. For example, a customer claiming prices increased post-merger has alleged antitrust injury because the harm to the customer stems from the merger's potential lessening of competition or creation of a monopoly.

>> For more information on the antitrust injury requirement, search [Antitrust Standing of Private Plaintiffs](#) on our website.

Courts are presumptively skeptical of competitors because, as rivals of the merging parties, they are seen as being motivated by a fear of heightened post-merger competition. Many competitor-driven lawsuits have been dismissed because the plaintiff failed to show antitrust injury (see *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1033 (9th Cir. 2001) and *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988)).

Meeting the antitrust injury prong of antitrust standing is difficult for competitors of the merging parties, as competitors are usually hurt by a more competitive, rather than a less competitive, market. For example, it is insufficient for a competitor seeking to enjoin a merger to allege that the merging firms will lower prices, become more efficient or otherwise compete more effectively against the competitor-plaintiff (even if the merger increases monopoly power). This is because the alleged harm is the result of an increase, rather than a decrease, in competition. While the antitrust laws are meant to redress injuries directly resulting from anticompetitive behavior, they are not meant to shield a party from competition.

Instead, a competitor must establish that it will suffer harm as the direct result of an anticompetitive effect of the transaction, including:

- Foreclosure from a market because the merged entity has been or will be able to require its suppliers to enter into exclusive supply agreements (see *Box, Competitor Antitrust Standing: Sprint Nextel Corp. v. AT&T Inc.*).
- Market share loss because the merged entity has been or will likely be engaging in predatory pricing.

>> For more information on predatory pricing, search [Section 2 of the Sherman Act: Overview](#) on our website.

Antitrust injury is only one of the factors considered when determining whether a competitor has antitrust standing. Even if a competitor successfully alleges antitrust injury, a court will not find antitrust standing if the alleged injury is too speculative. Conclusory or generalized allegations that the merged firm will engage in anticompetitive conduct are insufficient.

## Efficient Enforcer

In an action for damages (but not for injunctive relief), courts also evaluate several factors to determine whether the plaintiff is the appropriate party to enforce the claim. These factors include:

- The directness of the asserted injury.
- The existence of an identifiable class of persons whose self-interest would motivate them to pursue antitrust enforcement.
- The speculative nature of the alleged injury.
- The difficulty of identifying damages and apportioning them among direct and indirect victims to avoid duplicative recoveries.

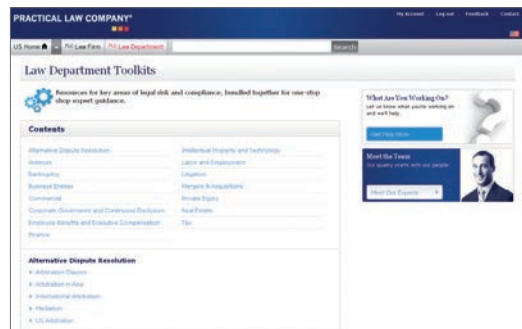
(See *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991).)

>> For more information on the efficient enforcer prong of antitrust standing, search [Antitrust Standing of Private Plaintiffs](#) on our website.

## HART-SCOTT-RODINO ACT TOOLKIT

The Hart-Scott-Rodino Act Toolkit available on [practicallaw.com](http://practicallaw.com) offers a collection of resources designed to guide counsel through the HSR process by identifying transactions reportable under HSR, and providing assistance with completing and filing the HSR form and with other procedures to minimize antitrust risk during the merger review process. It features a range of continuously maintained resources, including:

- [Corporate Transactions and Merger Control: Overview](#)
- [Determining Hart-Scott-Rodino Applicability](#)
- [Preparing the HSR Form: Buyer \(No Associates\)](#)
- [Antitrust Enforcement Actions: Gun-jumping](#)
- [Purchase Agreement: HSR Size-of-Person Test Not Met](#)
- [Valuing a Transaction under the HSR Rules Checklist](#)



## PRIVATE ACTIONS BY CONSUMERS

Consumers that are dissatisfied with the result of an antitrust agency's merger investigation can also attempt to challenge a transaction through private litigation, typically through a class action. Because the primary concern of the antitrust laws is to protect consumers from supracompetitive pricing, consumers alleging direct harm have little difficulty establishing antitrust standing and do not face the same antitrust injury hurdles as competitors (see above *Antitrust Standing*).

Direct purchasers (those who purchase products at supracompetitive prices directly from the merged firm) may pursue either:

- Treble damages.
- Injunctive relief to:
  - block the merger; or
  - force a divestiture or other merger remedy.

Indirect purchasers (those who purchase products from resellers or who purchase a product made from raw material that was supracompetitively priced) may seek an injunction blocking the merger or forcing a divestiture, although they are generally barred from seeking damages (see *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746–47 (1977)).

>> For more information on the ability of indirect purchasers to bring antitrust claims, search [State Illinois Brick Repealer Laws Chart](#) on our website.

Despite the lower antitrust injury threshold, consumers opposing a merger often conclude that it is more efficient and less burdensome to complain to the antitrust agencies than to incur the costs and risks associated with pursuing a private action, particularly because:

- Many consumer-based merger challenges are dismissed at an early stage of litigation, with the dismissals being affirmed on appeal.
- The antitrust agencies give the most weight to legitimate competitive concerns of consumers.

## COMPLAINING TO STATE ATTORNEYS GENERAL

In addition to the FTC and the DOJ, state attorneys general have the authority to investigate and challenge mergers, not only under their own state antitrust laws, but also under federal law (suing on behalf of its injured residents, known as *parens patriae*).

Complaining third parties should contact relevant state attorneys general (in addition to the FTC and the DOJ), in particular where there are local issues that the states are more likely to investigate and address than the federal antitrust agencies, including non-antitrust concerns such as post-merger employment levels. Local effects can arise in a variety of mergers, and are often associated with horizontal mergers in the following industries:

- Hospitals.
- Gas stations.
- Waste hauling.
- Retail supermarkets.

State attorneys general have increased enforcement efforts and coordination among themselves and with the federal agencies. Due to this increased activity and coordination, complaining third parties can benefit from having multiple state attorneys general become involved in (and fully investigate) a transaction. Not only does this ensure that a wider variety of issues

are considered in the investigation, but it can place additional pressure on:

- The federal antitrust agencies to also consider each of those issues.
- The merging parties who must battle on various fronts.

## LOBBYING CONGRESS

Merging parties in high-profile mergers often retain lobbyists in an attempt to persuade Congress to support their transaction. Similarly, competitors and consumer advocacy groups often lobby Congress in opposition.

Congress may set up hearings to examine the merits of a particular transaction, and the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights can publicly express approval or concern regarding a particular transaction. Ultimately, support or opposition from members of Congress may have some influence on public opinion and could be noticed by the agencies reviewing the transaction.

However, this tactic may not be the best use of a third party's time or money because:

- Congress has no authority or jurisdiction to determine whether or not a transaction is approved.
- The antitrust agencies are law enforcement organizations that should not be influenced by political considerations.

In the recent AT&T and T-Mobile transaction, AT&T reportedly spent millions of dollars lobbying the federal government in connection with the proposed acquisition. Consumer advocacy groups, such as Consumers Union, Free Press and Public Knowledge, as well as Sprint, lobbied Congress in opposition. As a result of these lobbying efforts, a group of members of Congress signed a letter describing the alleged benefits of the merger for rural communities and workers, while a number of other senators wrote letters warning that the merger would harm consumers and stifle innovation in the wireless market. Notwithstanding the considerable lobbying efforts by both sides, the DOJ independently decided to file suit to block the transaction.

## RETAINING INDUSTRY EXPERTS

Another way in which third parties can oppose a transaction is to retain industry experts or notable antitrust scholars to submit articles to recognized periodicals and publications, or to write letters to the federal antitrust agencies or Congress. Third parties can also submit these types of letters themselves.

