shares of the merging parties, other non-market share factors may appropriately be given less weight. . . .

Id. at 20903.

The importance of market share in predicting the consequences of a merger cannot be overemphasized. Judge Posner of the Seventh Circuit believes that the strict approach of the Supreme Court in the 1960s should not be forsaken despite such cases as *United States v. General Dynamics*, 415 U.S. 486 (1974) and *United States v. Citizens Southern Nat'l Bank*, 422 U.S. 86 (1975).

According to him, these cases:

show that market share figures are not always decisive in a Section 7 case, but it can be argued that the cases themselves carve only limited exceptions to the broad holdings of some of the merger decisions of the 1960s.

Hospital Corp. of America v. FTC, 807 F.2d 1381, 1385-86 (7th Cir. 1986).

Concentration figures answer the ultimate question in a Section 7 case, that is:

whether the challenged acquisition is likely to facilitate collusion. In this perspective the acquisition of a competitor has no economic significance of itself; the worry is that it may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors or reducing or limiting output, thereby pushing up the market price.

Hospital Corp., 807 F.2d at 1386.

The HHI in the relevant market or in the broader all concentrate market prior to the proposed acquisition was extremely high. The proposed acquisition would have increased the HHI significantly; such an increase creates a presumption of illegality. *See B.F. Goodrich*, 110 FTC 207 (1988), where the relevant market was only moderately concentrated according to the DOJ Guidelines. *Id.* at 313, 314. Nevertheless, according to the Commission, the concentration data:

are well above those that created a presumption of illegality in *United States v. General Dynamics* and *Weyerhaeuser*. In short, the concentration data create a relatively strong presumption of anticompetitive effects . . . and relatively strong evidence from other factors is needed to rebut that presumption.

Id. at 314.

The high concentration in the branded concentrate market suggests that collusion would have been relatively easy pre-acquisition and the proposed acquisition would have increased the ability of the firms in the market to agree on tactics for increasing prices or reducing pressure on prices.

The incentive to increase the price of concentrate is high and the market leaders, Coca-Cola and PepsiCo, recognize their mutual interdependence and have signaled each other about their pricing concerns (F. 328-334). Their concerns are, of course, with the low margins in the industry. Coca-Cola's president stated in Beverage World that:

> I think relief is coming. I don't know how significant that relief will be, but the fact of the matter is that margins have eroded and at some point in time these margins are going to have to be restored

(F. 332).

Thus, this is an industry where firms recognize that collusion would be profitable and the proposed acquisition, by increasing concentration in the sale of a product whose demand is relatively inelastic (F. 151-62), would have increased the opportunities for collusion. *See FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

> The supply of industrial dry corn was already highly concentrated before the acquisition, with only six firms of any significance. The acquisition has reduced that number to five. This will make it easier for leading members of the industry to collude on price and output without committing a detectable violation of Section 1 of the Sherman Act or Section 5 of the FTC Act, both of which forbid price fixing.

Id. at 905.

The incentive to collude is evident, and the opportunity for collusion is provided by information which is available from the Green Sheets (F. 327) and from bottlers which are often owned by concentrate firms (F. 335-41). Coca-Cola denies that bottler information would enhance collusive behavior, but its attempt to block the acquisitionof a Coca-Cola bottler belies its claim (F.338). Another effect of the proposed acquisition might be the transfer of Dr Pepper franchises from third bottlers (F. 352-59) and the consequent

reduction of the competitive viability of some of those bottlers (F. 360).

Coca-Cola suggests that the high concentration in the relevant markets does not reflect a true picture of an industry which is highly price and promotional-competitive (F. 208-20) and which cannot dictate the price of the finished product to purchasers (F. 342-46). It cannot be denied that the output of finished soft drinks has increased as concentration at the concentrate level has increased (F. 347), and there seems to be no statistically significant correlation between increasing concentration in the industry as a whole and the price of finished carbonated soft drinks (F. 348). However, the price of concentrate, with which this proceeding is concerned, has increased over the past several years at a greater rate than the increase in inflation (F. 23) and overall profits of the major firms have increased (F. 24).

These facts suggest that there will be a great incentive in the future to mitigate the effects of such competition as exists, and I cannot accept past competitive activity as a prediction of future industry conduct.

Finally, I reject as speculative Coca-Cola's claim that the proposed acquisition would have increased efficiency and overall industry competition (RPF 570-90).

D. *Entry Conditions*

The high concentration in the relevant markets prior to the proposed acquisition and the significant increase in concentration which would have resulted from the acquisition would be of no concern if there were no barriers to entry into these markets, for the sustained exercise of market power would not have been possible. *See B.F. Goodrich*, 110 FTC at 296, n.63.

Absolute barriers to entry are rare, and a standard has developed which analyzes entry in terms of the time it might take "for a motivated outsider to effect entry." Olin Corp., at 23. The DOJ Guidelines, Section 3.3, employ a two year standard.

Barriers to entry are generally considered to be additional long run costs that are incurred by an entrant but that were not incurred by incumbent firms. *Echlin Mfg. Co.*, 105 FTC 410, 485 (1985). As a practical matter, however, the courts and the Commission define barriers as any market condition which increases "the length of time

required for new entry to take place, by making the production process a complex one which requires substantial time to organize efficiently." R. Posner, Antitrust Law: An Economic Perspective 56 (1976).

Entry into most markets is not impossible. That is true with respect to carbonated soft drink concentrate; however, entry analysis looks not at whether some entry has occurred, but whether meaningful entry has been, and can be, successful. *Coca-Cola Bottling Co. of New York*, 93 FTC 110, 210, n.13 (1979):

> While it may be that anyone with an acre of land, a bathtub, and clean feet can make wine, profitable entry on a scale sufficient to provide meaningful competition for the industry leaders appears to be a considerably more difficult proposition, the dimensions of which are not entirely clear from the record. It is entry of the latter sort with which we must be principally concerned in evaluating the state of competition in an industry.

Entry into carbonated soft drink concentrate production and into the production of finished soft drinks is not difficult (F. 243-56), and there have been several new products developed by incumbents as well as several new entrants into the industry in the past few years (F. 321). Additionally, some so-called "boutique" firms have entered, and may capture some share of the carbonated soft drink market (F. 108).

However, these entrants provide no potential price restraining competition to the leaders in the most significant relevant market -- branded concentrate. In this market, there are substantial barriers or impediments to entry. These include the need for direct-store-door delivery, for which warehouse distribution is no substitute (F. 257-66), flavor restrictions which effectively prohibit bottlers from accepting franchises from new entrants (F. 267-73), the success of the major concentrate companies in capturing the majority of feature ads (F. 274-83), the introduction of new products by entrenched firms (F. 284-88), the time and money required to attain adequate penetration of the market, the importance of trademark equity, and the limited opportunities in the vending and fountain segments of the industry (F. 289).

The existence of these barriers and impediments is amply illustrated by the failure of highly-motivated, well-financed firms to attain successful entry into the branded concentrate market. These firms include Philip Morris-7 Up (F. 291-95); P&G (F. 296-98);

General Cinema (F. 299-303); Quaker Oats (F. 304-05); Orangina (F. 306-08); Anheuser-Busch (F. 309-11); and Dr Pepper (F. 312-20).

The evidence of entry barriers and failed entry attempts supports Dr. Hilke's conclusion that no firm could, through entry into the branded concentrate market, constrain the potential price increases which might result from the enhanced opportunity for collusion which would have been caused by the proposed acquisition. Since incumbent firms would be part of any collusive arrangement regarding price or production, they would not, by definition, defeat that arrangement by increasing production (F. 325).

E. *The Proposed Order*

Once the Commission finds that a respondent has violated a law which it administers, it has wide discretion to fashion a remedy which will prevent future violations. *Jacobs Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946): one such remedy in merger cases is the imposition of a prior approval requirement. *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 984-85 (8th Cir. 1981), *cert. denied*, 456 U.S. 915, 985-86 (1982); *Abex Corp v. FTC*, 420 F.2d 928 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970); *Hospital Corp. of America*, 106 FTC 361, 513-14 (1985); *Ekco Products Co.*, 65 FTC 1163, 1216, 1222 (1964).

Coca-Cola does not dispute the Commission's right to impose a prior approval clause in appropriate circumstances, but it argues here that the clause sought in complaint counsel's proposed order goes beyond the remedy sought in the complaint, that its entry would place it at a competitive disadvantage vis-a-vis its competitors, and that it is being proposed to punish Coca-Cola for exercising its statutory right to judicial review of the Commission's opposition to the proposed acquisition.

As to the last argument, Coca-Cola contrasts the Commission's approach in this case with its failure to proceed against PepsiCo for its proposed acquisition of Seven Up (F. 372-75), and it appears, for there is no other explanation for its action, that the Commission's inconsistent treatment of the Coca-Cola and PepsiCo proposed acquisitions was intended to punish Coca-Cola for forcing the Commission to seek judicial relief (F. 376).

I do not reject the proposed order for this reason, but for a much more convincing reason: the Bureau of Competition's concurrence

with Coca-Cola's motion to dismiss because of the lack of public interest in obtaining a prior approval order (F. 362).

Complaint counsel recognize in their findings the efficiencies which have been realized in the past several years by the reduction in the number of bottlers (CPF 196-212), and the Commission has challenged only one of twenty-three bottler acquisitions which have occurred in the past five years. Concentrate firm acquisitions have also been ignored (F. 370-71).

Given these facts, I cannot justify entry of the remedy sought for:

> it is industry market structure and market conditions, not whether a "knowing and deliberate violation" or a "likelihood of repeated unlawful conduct" has been shown as AMI asserts, that determines the appropriateness of imposing a prior approval requirement in a particular case.

American Medical International, Inc., 104 FTC 1, 224 (1984).

In conclusion, complaint counsel assume, contrary to the evidence, that all acquisitions in the concentrate and bottling industry would be anticompetitive, *AMI,* 104 FTC at 225. My analysis of the record and the Bureau's own position before trial was held ("recent developments in the soft drink and concentrate industries, render prior approval an unnecessary remedy") (F. 362) support the conclusion that it would not be in the public interest to saddle Coca-Cola with an unnecessary and potentially disruptive prior approval order which might place it on an "unequal footing with its principal competitors" *AMI,* 104 FTC at 226.

Since a prior approval order is the only remedy proposed by complaint counsel, I will enter no order despite my conclusion that the proposed acquisition would have violated Section 7 of the Clayton Act and Section 5 of the FTC Act if it had been consummated.

F. *Summary*

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over Coca-Cola.
2. This proceeding is in the public interest.
3. At all times relevant herein, Coca-Cola has been, and is, engaged in commerce as commerce is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and its business is in or

affects commerce as commerce is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

4. The most appropriate relevant market in which the effects of the proposed acquisition should be assessed is the manufacture and sale of branded concentrate and syrup used in the production of branded carbonated soft drinks; another is the manufacture and sale of all concentrate and syrup used to produce carbonated soft drinks.

5. The section of the country in which it is appropriate to assess the effects of the proposed acquisition is the nation as a whole.

6. The relevant markets are highly concentrated and the proposed acquisition would have significantly increased concentration in those markets.

7. Entry into the relevant markets is difficult, risky, and time consuming.

8. Expansion by fringe firms in the relevant markets is extremely unlikely.

9. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways:

(a) Elimination of Dr Pepper Company as a substantial, independent competitive force in the relevant markets;

(b) Increasing the likelihood of, or facilitating, collusion;

(c) Increasing the difficulty of entry; and

(d) Raising the costs and reducing the competitiveness of other firms in the relevant markets.

10. All of the above increase the likelihood that firms will increase prices and restrict the output of carbonated soft drinks both in the near future and in the longer run.

11. The agreement between Coca-Cola and DP Holdings, Inc. to acquire the Dr Pepper Company was in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 5. *See Rhinechem Corp.*, 93 FTC 233 (1979).

12. An order requiring Coca-Cola to obtain the prior approval of the Commission before acquiring any other concentrate or bottling company is not in the public interest. Since the Commission seeks no other remedy, no cease and desist order will be entered.

OPINION OF THE COMMISSION

BY OWEN, *Commissioner*:

I. INTRODUCTION

This case involves a prospective combination of The Coca-Cola Company ("Coca-Cola") and the Dr Pepper Company ("Dr Pepper"), which was enjoined before consummation.[1] Both companies make soft drink concentrates and syrups that are used by bottlers to produce carbonated soft drinks for sale to consumers.[2] In 1986, when Coca-Cola had the largest market share among soft drink concentrate producers, and Dr Pepper was the fourth largest producer, IDFF paragraph 226, Coca-Cola entered into an agreement whereby Coca-Cola was to acquire all of the stock in DP Holdings, Inc.[3] ("DP Holdings"), which owned 100% of the stock of Dr Pepper, for a total consideration of approximately $470 million. IDFF paragraph 9.

The Commission filed an administrative complaint pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 11 of the Clayton Act, 15 U.S.C. 21, alleging that Coca-Cola's acquisition of Dr Pepper would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. The complaint further alleged that the agreement itself constituted a separate violation of Section 5 of the FTC Act.

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[1] The following abbreviations are used in this opinion:

ID	Initial Decision (page no.)
IDFF	Initial Decision Findings of Fact. (Paragraph no.)
AD	Brief of Counsel Supporting the Complaint in Support of Appeal from Initial Decision
ABCA	Answering Brief of Appellee and Cross-Appellant The Coca-Cola Company
ATr.	Transcript of Oral Argument before the Federal Trade Commission (June 6, 1991)
RBCA	Reply Brief of Appellee and Cross-Appellant The Coca-Cola Company
RBCC	Reply Brief of Counsel Supporting the Complaint

[2] Concentrate is sold by producers, such as Coca-Cola and PepsiCo, to bottlers, which combine the concentrate with carbonated water and sweetener, and package the resulting soft drinks in cans or bottles for sale to consumers. (Some concentrate, such as for "diet" drinks, is sold premixed with sweeteners.) Neither Coca-Cola nor Dr Pepper is a bottler, although Coca-Cola has ownership interests in bottlers. IDFF paragraph 203. Syrup, which is made by adding water and sweetener to concentrate, is sold to fountain wholesalers. The wholesalers distribute the syrup to retail outlets, which combine it with carbonated water to produce soft drinks for soda fountains or certain types of vending equipment.

[3] DP Holdings, Inc., a Delaware corporation, was a holding company created as a vehicle for an earlier leveraged buy out of Dr Pepper. IDFF paragraph 5.

The administrative law judge ("ALJ") who tried the case concluded that the proposed acquisition was likely to substantially lessen competition in the national markets for branded soft drink concentrate and for all soft drink concentrate. However, he declined to issue an order against Coca-Cola on the ground that an order was not in the public interest. Commission complaint counsel appealed, and Coca-Cola cross-appealed the findings of violations of the FTC and Clayton Acts. Having considered the parties' briefs and arguments, and the record as a whole, we affirm the finding of violations of the FTC and Clayton Acts, and reverse the conclusion that a prior approval order should not be entered against Coca-Cola.[4]

II. HISTORY OF THE PROCEEDING

Coca-Cola's efforts to acquire Dr Pepper occurred at the same time that PepsiCo, Inc. sought to acquire the Seven-Up Company (another concentrate manufacturer) from Philip Morris, Inc.[5] The Commission investigated both transactions simultaneously, and on June 20, 1986, authorized its staff to seek injunctive relief against both on June 23, Philip Morris announced that it was terminating its acquisition agreement with PepsiCo. On June 24, the Commission filed suit in federal district court, seeking a preliminary injunction against Coca-Cola's impending acquisition pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b).[6] On July 15, 1986, while the district court action was pending, the Commission issued an administrative complaint against Coca-Cola.[7] *See* IDFF paragraphs 7-11, 372-75.

In the injunction proceeding, the district court found that the Commission had made a sufficient preliminary showing that the acquisition was likely to substantially lessen competition in the market for carbonated soft drink concentrates. Accordingly, on July

[4] We adopt the findings of fact in the ALJ's Initial Decision to the extent that they are not inconsistent with this opinion.

[5] Coca-Cola has stated that its proposed acquisition of Dr Pepper was a "defensive" maneuver spurred by PepsiCo's plan to acquire Seven-Up. ATr. at 61. *See* IDFF paragraph 10.

[6] In lieu of a temporary restraining order, the parties agreed to defer implementing their acquisition agreement pending a ruling on the Commission's application for a preliminary injunction. *See FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1129 n.2 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987) (per curiam).

[7] The Commission did not file an injunctive action or administrative complaint against PepsiCo because of the earlier abandonment of PepsiCo's acquisition (*see infra* Part III.B.).

31, 1986, the district court issued a preliminary injunction against the transaction.[8]

On August 5, 1986, the shareholders of DP Holdings announced their desire to terminate the purchase agreement, and later sold Dr Pepper to an investment group headed by Hicks & Haas.[9] Coca-Cola then moved to dismiss the Commission's pending administrative complaint, asserting that the costs of litigation outweighed the likely benefits of any remedial order that might result. The Commission denied the motion on the ground that if the Commission ultimately found that the proposed acquisition violated the law, its cancellation by DP Holdings did not eliminate the need for prospective relief. *See* Order Denying Respondent's Motion for Dismissal of the Complaint (Aug. 9, 1988); IDFF paragraph 12.

The administrative case was tried in 1990 before Administrative Law Judge Lewis F. Parker. On November 30, 1990, ALJ Parker issued his opinion, finding that branded concentrate used to produce branded carbonated soft drinks was the most appropriate relevant market in which to assess the effects of the acquisition (ID 99), and that all concentrate and syrup used to produce carbonated soft drinks also constituted a relevant market (ID 107).[10] He found that the relevant geographic market was the nation as a whole (ID 99); that there were substantial barriers or impediments to entry into branded soft drink concentrate (ID 105), making entry difficult, risky and time-consuming (ID 108); and that expansion by fringe firms was extremely unlikely (ID 105-106, 108). The ALJ found that the relevant markets were highly concentrated, and that the proposed acquisition would substantially increase that concentration (ID 102).

The ALJ found that the acquisition would:

(1) Eliminate Dr Pepper as a substantial, independent competitive force in the relevant markets;

(2) Increase the likelihood of or facilitate collusion;

(3) Increase the difficulty of entry; and

(4) Raise the costs and reduce the competitiveness of other firms in the relevant markets.

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[8] 641 F. Supp. at 1141.

[9] After this action, Coca-Cola withdrew its pending appeal of the preliminary injunction and successfully petitioned the court of appeals to vacate the district court's order on grounds of mootness. *FTC v. Coca-Cola Co.*, 829 F.2d 191.

[10] The ALJ rejected Coca-Cola's assertion that the relevant market consisted of all beverages. *See* IDFF paragraphs 49-66, 160; ID 93-94.

ID 108. These factors, according to the ALJ, all "increase the likelihood that firms will increase prices and restrict the output of carbonated soft drinks both in the near future and in the longer run." *Id.*

The ALJ concluded that the effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. He further found that the acquisition agreement between Coca-Cola and DP Holdings violated Section 5 of the FTC Act. *Id.* Despite these conclusions, the ALJ declined to issue an order against Coca-Cola, reasoning that an order requiring respondent to obtain the prior approval from the Commission before acquiring any other concentrate or bottling company would not be in the public interest. ID 107. This conclusion was based on the ALJ's evaluation of the record, and on the Bureau of Competition's earlier concurrence with Coca-Cola's 1986 motion to dismiss the complaint on public interest grounds. ID 106.

For the reasons set forth below, we affirm ALJ Parker's finding of law violations, and reverse his decision against entry of an order; however, we decline to enter, in its entirety, the order sought by complaint counsel.

III. THE COMMISSION'S AUTHORITY TO PROSECUTE THIS ACTION

Coca-Cola contends that the ALJ erred by rejecting four challenges to the Commission's authority to prosecute this action. First, Coca-Cola argues that the ALJ should have dismissed paragraphs 11 and 13 of the complaint (alleging that the proposed acquisition would violate the Clayton and FTC Acts) on the ground that the acquisition was never consummated. ABCA at 86-89. Second, respondent asserts that the ALJ erred in finding that the purchase agreement violated Section 5 of the FTC Act. ABCA at 92-96. Third, Coca-Cola argues that the ALJ should have dismissed the entire complaint as moot. ABCA at 91 n.44. Finally, respondent contends that the ALJ should have dismissed the complaint on the ground that prosecution of the administrative action was vindictive, arbitrary and capricious, and therefore violated the Due Process Clause of the Fifth Amendment to the United States Constitution. ABCA at 96-102. We find Coca-Cola's arguments to be without merit.

A. *The Commission's Authority to Conduct Administrative Proceedings Concerning an Acquisition Enjoined Prior to Consummation*

1. The Commission's statutory jurisdiction over acts alleged in paragraphs 11 and 13 of the complaint

Paragraph 11 of the complaint alleged that "[t]he proposed acquisition of the stock of DP Holdings by Coca-Cola would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18." Paragraph 13 of the complaint similarly alleged that the proposed acquisition "would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45." Coca-Cola contends that these paragraphs articulate only "threatened" violations of the Clayton and FTC Acts. ABCA at 89. The Commission's suit for a preliminary injunction under Section 13(b) of the FTC Act prevented the parties from consummating the acquisition before the Commission issued its administrative complaint. Coca-Cola argues that because the acquisition was not fully consummated, it did not violate Section 5 or Section 7 (ABCA at 88-89). Coca-Cola further argues that the Commission lacked jurisdiction to adjudicate the lawfulness of the enjoined acquisition because its jurisdiction allegedly does not reach prospective law violations (ABCA at 87-89, 91-92). Finally, it argues that, even if the Commission initially had jurisdiction, that jurisdiction lapsed when the parties announced their intention to abandon the transaction (after the district court issued a preliminary injunction against it) (RBCA at 51 n.36).

The ALJ rejected these arguments and refused to dismiss the charges in paragraphs 11 and 13. *See* Order Denying Respondent's Motion to Dismiss the Complaint (Mar. 13, 1990). For the reasons below, we agree with the ALJ that complaint paragraphs 11 and 13 stated charges that were within the Commission's jurisdiction.

It is important to identify the nature of the conduct at issue here and the consequences of respondent's arguments. Coca-Cola challenges the Commission's jurisdiction over "possible future violations" of the Clayton Act (ABCA at 87-89, 91-92), as if the acquisition of Dr Pepper were some remote hypothetical. In fact, Coca-Cola and DP Holdings had agreed on all details of the acquisition; had filed statutorily required notices of their transaction; had contractually committed themselves to going forward unless the

government obtained an injunction (and, even then, they were bound to use "their best efforts to have any such . . . injunction lifted" *(see infra* p. 15, note 26)); and persisted in their transaction after the Commission notified them of its objections and of its intention to seek an injunction if forced to do so. In other words, a federal court injunction was the only barrier to full consummation. Far from being a "possible future violation," the acquisition was certain, absent government intervention.[11]

Moreover, the consequence of Coca-Cola's argument is that once the Commission obtained a preliminary injunction under Section 13(b) of the FTC Act, it would lose jurisdiction to conduct administrative adjudications of the lawfulness of unconsummated acquisitions or other impending violations of law.[12] The preliminary injunction would then have to be dissolved, both because Section 13(b) limits a preliminary injunction to a maximum of 20 days unless the Commission issues an administrative complaint within that period,[13] and because the Commission, lacking jurisdiction, presumably could no longer show any prospect of success on the ultimate merits. The parties would then be free to revive their transaction, forcing the Commission to go to court once again. Such a wasteful duplication of agency efforts and drain on judicial resources could hardly be what Congress envisioned for the Commission's enforcement practices.

We have previously rejected an argument virtually identical to Coca-Cola's:

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[11] Coca-Cola's argument that only fully consummated transactions violate Section 7 of the Clayton Act ignores the courts' flexible construction of "acquire" in Section 7 to reach transactions that fall short of being consummated acquisitions. *See, e.g., McTamney v. Stolt Tankers & Terminals (Holdings), S.A.*, 678 F. Supp. 118, 120 (E.D. Pa. 1987); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 181-83 (S.D.N.Y. 1109-0). It also ignores the probabilistic focus of Section 7, which was intended to "arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914); *see also Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) ("HCA").

[12] The consequences of respondent's argument are not limited to acquisitions; the same result would occur if the Commission sought to preliminarily enjoin other unlawful conduct that is imminent but not yet implemented. While respondent suggests that the Commission might retain the ability to challenge unconsummated mergers by attacking the legality of some acquisition agreements (but not the Coca-Cola/Dr Pepper agreement, *see infra* Part III.A.2.) such an alternative may be unavailable in other contexts, *e.g.*, when a person is about to engage in a deceptive practice.

[13] An administrative complaint may be dispensed with only where the Commission seeks a permanent court injunction under the last proviso of Section 13(b). (Coca-Cola's argument that the Commission could abandon administrative adjudications in favor of federal court litigation to obtain a permanent injunction is discussed *infra*.)

> The Commission's subject-matter jurisdiction depends on the nature of the alleged illegal conduct, and not on whether it is ongoing at any particular point during the trial. To hold otherwise would mean that a Commission law enforcement action could be brought to a halt at any time . . . by an abandonment, even a temporary one, of the challenged conduct. [V]oluntary cessation of unlawful activity is not a basis for halting a law enforcement action.

Warner Communications, Inc., 105 FTC 342 (1985).[14] The Commission's adjudicative jurisdiction is thus similar to a federal district court's jurisdiction to judge the legality of, and enjoin, a challenged practice; such jurisdiction does not evaporate simply because a defendant has abandoned the practice. *See, e.g., R.C. Bigelow, Inc. v. Unilever, N.V.*, 867 F.2d 102, 106 (2d Cir.) (suit to enjoin merger not mooted by abandonment of transaction), *cert. denied*, 493 U.S. 815 (1989); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1387 (5th Cir. 1980); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945).[15]

In addition to creating an untenable situation for law enforcement, Coca-Cola's argument that the Commission lacks jurisdiction over unconsummated acquisitions (or over any other imminent violation of a law enforced by the Commission) is legally defective. Respondent's argument is based on the particular tenses used in Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the FTC Act, 15 U.S.C. 45(b). Section 11(b) authorizes the Commission to issue an administrative complaint when it has reason to believe that a person "is violating or has violated" certain sections of the Clayton Act (including Section 7). Section 5(b) authorizes an administrative complaint when the Commission has reason to believe that a person "has been or is using any unfair method of competition . . . ." Coca-Cola reads this language as permitting actions only against past or ongoing law violations, and not against imminent violations (ABCA at 87-89, 91-92).

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[14] After the Commission obtained a preliminary injunction against a proposed merger between Warner Communications and Polygram Records *(FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984)), the parties abandoned the transaction, and moved to dismiss the Commission's pending administrative complaint. The Commission denied the motion.

[15] A case may, of course, be moot if there is no reasonable likelihood of recurrence. *W.T. Grant Co.*, 345 U.S. at 633. Respondent's mootness argument is discussed *infra* Part III.A.3.

Coca-Cola's focus on these sections is misplaced. Section 11(b) and Section 5(b) are "purely procedural." Adventist Health Sys./West, FTC Dkt. No. 9234, slip op. at 13 n.26 (Aug. 2, 1991). In contrast, the Commission's subject matter jurisdiction over this case is conferred by Section 5(a)(2) of the FTC Act and Section 11(a) of the Clayton Act. These sections respectively empower the Commission "to prevent" persons from using unfair methods of competition, and grant it "authority to enforce compliance" with the Clayton Act.[16] They are forward-looking provisions that focus on preventing future illegal conduct rather than on punishing past wrongdoing. *See, e.g., FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952); *FTC v. Cement Inst.,* 333 U.S. 683, 706 (1948).[17] The Commission's action against an almost consummated acquisition is consistent with Congress' enactment of the FTC and Clayton Acts in order to halt potentially anticompetitive practices and mergers in their incipiency. *See, e.g., FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957); *Grand Union Co. v. FTC,* 300 F.2d 92, 98-99 (2d Cir. 1962) (FTC Act "intended to be prophylactic: to stop in their incipiency acts which when full blown would lead to monopoly or undue hindrance of competition"); and *see also supra* p. 6, note 11.

Seemingly oblivious to this broad statutory scheme, Coca-Cola's argument for an incapacitating limitation on the Commission's jurisdiction singles out two isolated phrases ("is violating or has violated" in Section 11(b) and "has been or is using" in Section 5(b)). Coca-Cola has not pointed to any legislative history indicating that the use of the present and past tenses in these procedural sections was intended to set a limit on the Commission's broad jurisdiction. Rather, at the time that the FTC and Clayton Acts were enacted, the Commission was less likely to have advance notice of planned, but unexecuted activities, and lacked any express powers to obtain preliminary relief. Accordingly, the language cited by Coca-Cola

16 Specifically, Section 5(a)(2) empowers and directs the Commission "to prevent persons, partnerships, or corporations... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." (Emphasis supplied.) Section 11(a) vests the Commission with "authority to enforce compliance" with Sections 2, 3, 7, and 8 of the Clayton Act.

17 Given the prophylactic nature of Commission orders to cease and desist, it is less important to show that an activity has crossed the line from impending to actualized than it might be in the context of a proceeding designed to punish wrongdoing. *Cf. e.g., W.T. Grant Co.*, 345 U.S. at 633 (an injunction against future law violations can be granted "even without a showing of past wrongs"); *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) ("All it takes to make the cause of action for relief by injunction is a real threat of future violation...."