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Transfer of Venue in Government Merger Challenges

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WHEN THE ANTITRUST DIVISION of the Department of Justice challenged Microsemi's acquisition of Semicoa in 2008, it filed the complaint in the Eastern District of Virginia. Microsemi filed a motion under 28 U.S.C. § 1404 to transfer the case to the Central District of California, where Microsemi is based.[1] Until this transfer motion in *Microsemi*, merging parties in government antitrust challenges essentially accepted the DOJ's choice of forum.[2] *Microsemi* started a trend—since 2008, defendants in three subsequent merger cases, *FTC v. LabCorp*, *United States v. H&R Block*, and *FTC v. Graco* have moved to transfer venue, in each case moving to transfer out of the District Court for the District of Columbia.[3] The merging parties in these cases have generally succeeded: motions to transfer venue were granted in three out of the four cases.

This article explores how the Federal Trade Commission may have both started and intensified this trend as a result of its explicit forum-shopping in *FTC v. Cephalon*[4] (and *FTC v. Watson*[5]), non-merger antitrust cases that established key precedent that was extensively relied upon by the parties and courts in *Microsemi*, *LabCorp*, *H&R Block*, and *Graco*. The article concludes with practical considerations relating to transfer of venue in merger cases.

Venue and Choice of Forum in Government Merger Challenges

The procedural framework for merger challenges differs significantly for the DOJ and the FTC, but both agencies face a choice of venue when deciding to challenge a merger.[6] If either the DOJ or the FTC concludes that a transaction will violate Section 7 of the Clayton Act, it must seek a preliminary injunction in a federal district court to prevent the parties from closing the transaction once any statutory waiting periods under the HSR Act have expired.

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Venue in DOJ and FTC merger challenges is governed by three main statutes: (1) the general venue statute in 28 U.S.C. § 1391; (2) the Clayton Act's venue statute; and (3) the FTC Act's venue statute.[7] The Clayton Act and FTC Act venue provisions broaden Section 1391 substantially, allowing the DOJ and FTC to bring suit in any district where the defendant may be found or transacts business. Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also *in any district wherein it may be found or transacts business*; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.[8]

The Supreme Court has held that the broader language of Section 12 of the Clayton Act was intended to make it easier for plaintiffs (like the DOJ) to establish proper venue by allowing a merger challenge to be brought in any district where the defendant "transacts business," interpreted broadly.[9] Venue for FTC merger challenges is governed by Section 13(b) of the FTC Act.[10] Courts have interpreted § 13(b) to provide that venue is proper: (1) where a defendant resides; (2) where a defendant transacts business; or (3) wherever venue is proper under the general venue statute, 28 U.S.C. § 1391.[11]

DOJ and FTC Choice of Forum. Although the relevant venue statutes for the DOJ and FTC allow the agencies to file a merger challenge in any venue where the merging parties "transact business," historically the agencies have filed merger challenges either in the District of Columbia or in the district where the acquirer or the target company has a headquarters office. From 1992–2013, the DOJ and FTC filed 246 federal district court actions in merger cases. Out of these actions, 176 were DOJ complaints filed concurrently with a proposed settlement agreement, and thus venue for these actions would essentially never be an issue because the court is involved only to approve the settlement. In the other 70 cases, the DOJ and FTC filed an action seeking a preliminary injunction where choice of venue could have been a live issue—in 31 of these 70 cases (or about 44 percent) the complaint was filed in the District of Columbia. The vast majority of federal district courts have seen at most one government merger challenge, if any at all.

Where geographic markets are national, the DOJ and FTC have at least two obvious choices for filing a merger challenge—D.D.C. or the district where one or both of the parties or target assets is located.[12] In the majority of these cases (28 out of 44, or 64 percent of the time) the agencies have chosen to file in D.D.C. The FTC has filed in D.D.C. in cases with national geographic markets 79 percent of the time (in 15 out of 19 cases). The following table summarizes where merger cases have been filed, for national and local geographic markets:

Where the relevant geographic market is local or regional, the agencies have almost always filed in the district court

Table 1: Summary of Actions Filed by District Court

	National Geographic Market			Not a National Geographic Market		
District Court	DOJ	FTC	Total	DOJ	FTC	Total
D.D.C.	13	15	28	1	2	3
N.D. Cal.	3	1	4	0	0	0
D. Del.	2	0	2	0	0	0
M.D. Fla.	0	0	0	0	2	2
M.D. Ga.	1	0	1	0	1	1
N.D. Ill.	1	0	1	0	1	1
E.D. Mich.	1	0	1	0	1	1
W.D. Mich.	0	0	0	0	2	2
E.D.N.Y.	0	0	0	2	0	2
S.D.N.Y.	0	2	2	1	0	1
W.D. Pa.	1	0	1	0	1	1
E.D. Va.	1	0	1	0	1	1
Others (one case each)	2	1	3	4	7	11
Total number of complaints/ Preliminary injunction motions	25	19	44	8	18	26

Source: HSR Enforcement Reports 1992–2013 (excluding DOJ consent decrees)

containing the geographic market. In these "local" cases, even with the broad venue statutes available to the DOJ and the FTC, filing in D.D.C. may not be an option because the parties are unlikely to "transact business" there.[13] Where competitive effects are local or regional, venue may *only* be proper in the district where the parties are located (or where the transaction is taking place). Prime examples of these cases include challenges to hospital mergers. Since 1992, the DOJ and FTC have challenged dozens of hospital mergers, litigating eleven through a decision on a preliminary injunction and, in some cases, appeals. All eleven of the litigated cases were filed in the district court where the hospitals were located (and not in D.D.C.).

Venue and Government Win/Loss Record in Litigated Cases. Although the agencies have sought an injunction to challenge a merger in 70 cases, only 33 of those cases were "litigated" to a decision or order on the injunction. In the other 37 cases, the parties either abandoned the transaction (24 cases), restructured/settled with the government (12 cases), or the case is pending. In litigated cases, the agencies' win/loss record in D.D.C. is significantly better than their record outside of D.D.C. The DOJ and FTC have a combined record of 9–3 in D.D.C. (75 percent wins), while outside of D.D.C. they are 9–12 (43 percent wins). Where there is a choice of venue, a simple review of the agencies' win-loss record suggests they may be better off filing the case in D.D.C.

All else equal, based on the agencies' record in and out of D.D.C., two conclusions are apparent: First, it seems likely that the FTC and DOJ will seek to file a case in D.D.C. whenever possible.[14] Second, depending on the alternative venues, merging parties should seriously consider transferring out of D.D.C. whenever possible. As explained below, this is precisely what merging parties have begun to do.

Transfer of Venue in Merger Cases—Forum-Shopping and *Cephalon*

Before 2008, transfer of venue in government merger challenges was extremely rare.[15] Since 2008, merging parties in four cases—*Microsemi*, *LabCorp*, *H&R Block*, and *Graco*—have sought to transfer the case to a different court. Ironically, it was forum choice by the FTC in a non-merger case, *Cephalon*, that arguably enabled and encouraged this trend. The findings in the order granting transfer of venue in *Cephalon* in 2008 were relied on by the parties and courts in all three cases where venue transfer motions have been granted.

Transfer of Venue Under 28 U.S.C. § 1404. The venue transfer statute is 28 U.S.C. § 1404, which provides, "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." A district court therefore may exercise its discretion in deciding whether to grant a motion to transfer venue.

In ruling on a motion to transfer venue under Section 1404, courts have engaged in a two-step inquiry: (1) a determination of whether the action could have been filed in the transferee district (and it almost always could have been, given the broad venue statutes); and, if so, (2) an assessment of whether a transfer to the proposed venue would be appropriate based on a number of factors relevant to the convenience of the parties and witnesses ("private interest" factors) and the interest of justice ("public interest" factors).[16]

The second element of the Section 1404(a) transfer inquiry requires a case-by-case assessment, including factors such as the parties' choice of forum, whether the claim arose elsewhere, convenience, the court's familiarity with the laws, case loads, and any local interests in deciding the issues in a particular venue.[17] Antitrust courts have focused the transfer inquiry under Section 1404 on the issue of where the claims arose and the convenience of witnesses.[18]

Courts weighing motions to transfer venue have afforded significant deference to the plaintiff's choice of forum to avoid undermining that choice and merely shifting the inconvenience of trial from the defendant to the plaintiff.[19] In antitrust cases, courts have gone even further than the traditional deference given to a plaintiff's choice of forum and

afforded the government's choice of venue "heightened respect," in part because of the liberal statutory venue provisions applicable to government antitrust challenges.[20] As explained below, however, where a case has no real nexus to the chosen forum—as in the FTC's challenge in *Cephalon*—the government's choice of forum in antitrust cases has not been entitled to deference.

Cephalon, Meaningful Ties, and Inconsistent Judgments. In *Cephalon*, the FTC challenged pharmaceutical manufacturer Cephalon's patent settlement agreements with four generic drug manufacturers.[21] The FTC alleged that Cephalon's settlements violated the antitrust laws and sought an injunction under Section 13(b) of the FTC Act. The FTC filed its complaint in D.D.C. in February 2008, even though a private damages class action based on the exact same settlement agreements had been filed in the Eastern District of Pennsylvania almost two years earlier.[22]

Cephalon moved to transfer the case to the Eastern District of Pennsylvania, where the private action was pending and where, at the time, the district court was considering Cephalon's motion to dismiss. As the district court (Judge Bates) noted in its ruling on the motion to transfer, the Commission was "rather openly shopping for a circuit split on the issue of reverse-payment Hatch-Waxman settlements, and all the better if the FTC could potentially arrange for two courts of appeals—the Third and D.C. Circuits—to decide that question in the context of what is essentially the same case."[23] Ultimately, the court granted Cephalon's motion to transfer to the Eastern District of Pennsylvania. In a similar patent settlement case the following year, *FTC v. Watson*, the parties successfully moved to transfer venue, from the Central District of California to the Northern District of Georgia (where the underlying patent disputes in the case had been filed and where the settlements were agreed).[24]

Although *Cephalon* and *Watson* were not merger cases, the same FTC Act venue statute applies, and the cases establish clear precedent on two key issues for transfer motions in merger cases. These include (1) the degree of deference to be afforded to the DOJ's or FTC's choice of forum, and (2) the relevance of ongoing and related court proceedings.

In considering the private interest factors in the Section 1404 analysis, the district court in *Cephalon* focused on how little connection to the venue the case had, noting that "there is essentially no nexus between the District of Columbia and this controversy."[25] The FTC's primary argument against transfer was that the plaintiff's choice of forum is entitled to great deference. However, the court distinguished the prior cases that granted deference to the government's choice of forum and highlighted that "meaningful ties" to a forum are a "critical limitation" on that deference:

> This Court has previously stated: "*if the particular controversy has meaningful ties to the forum*, and the plaintiff is a resident of that forum, the plaintiff's choice of forum is given substantial deference." Here, apart from the fact that many of the FTC's prosecuting attorneys are located in this area, there are no meaningful ties between the District of Columbia and the events (or parties) that gave rise to this action.[26]

The court in *Cephalon* held that the "most compelling factor" in favor of transfer was "the risk of inconsistent judgments that would arise if this case is not transferred."[27] Because Cephalon was facing private damages actions in the Eastern District of Pennsylvania arising out of the exact same conduct and seeking a similar ruling (that the conduct was anticompetitive in violation of the antitrust laws), the district court saw a "grave risk" of inconsistent judgments (a risk that was undisputed by the FTC, given its goal of obtaining a circuit split).[28] Although the FTC alleged that courts "routinely deny such transfer requests when related cases are pending in different districts, even though inconsistent results are always possible,"[29] the district court cited ample precedent that a transfer to a district where related actions are pending is appropriate.[30]

The FTC's attempt at forum shopping in *Cephalon* led the court to identify the risk of inconsistent judgments as a compelling factor weighing in favor of transfer. After *Cephalon*, without meaningful substantive ties to the D.D.C. (or any chosen forum), the government's ability to file an action in D.D.C. and keep it there in the face of a motion to transfer appears to have been significantly limited.

Lessons from Recent Transfers

In 2008, just months after a successful transfer in *Cephalon*, parties in government merger challenges started filing motions to transfer venue out of the government's chosen forum (which in most cases has been D.D.C.). As summarized in the table below, three out of four attempts at transfer have been successful. In each case the parties cited *Cephalon*, and in all of the successful transfers, the district court held that the government's choice of forum was not entitled to substantial deference because there was no meaningful tie to D.D.C.

Table 2: Summary of Transfer of Venue Attempts In Recent Government Merger Cases

Case (Date)	Agency	Districts	Transfer Granted?
Microsemi/Semicoa (2009)	DOJ	E.D. V.A. → C.D. Cal.	Yes
LabCorp/Westcliff (2010)	FTC	D.D.C. → C.D. Cal.	Yes
H&R Block/TaxAct (2011)	DOJ	D.D.C. → W.D. Mo.	No
Graco/ITW (2012)	FTC	D.D.C. → D. Minn.	Yes

Forum shopping in *Microsemi*. In December 2008, the DOJ challenged Microsemi's acquisition of Semicoa. The complaint was filed in the Eastern District of Virginia. even

though the transaction at issue had very few ties to Virginia (a limited amount of sales). The DOJ alleged that the transaction was a merger to monopoly in a relevant market for a particular kind of signal transistor, and sought and obtained a temporary restraining order and preliminary injunction that would require Microsemi to preserve and maintain the acquired assets.[31]

Microsemi successfully moved to transfer the case under 28 U.S.C. § 1404(a) to the Central District of California. Microsemi's primary argument was that the acquisition of the Semicoa assets had nothing to do with Virginia and therefore the DOJ's choice of forum should not be entitled to deference.[32] The court agreed and, consistent with the ruling in *Cephalon* just eight months earlier, concluded:

> In this case, DOJ is not located in Virginia . . . and the cause of action arose in California. Where the plaintiff is not located in the chosen district and the cause of action did not arise in that district, the plaintiff's choice of forum is not entitled to substantial weight.[33]

Once transferred to California, trial was scheduled to begin eight months later, in August 2009. However, just before trial Microsemi settled with the DOJ and agreed to divest all assets acquired in the original transaction. In the end, therefore, the DOJ effectively succeeded in challenging Microsemi's acquisition.[34]

Risk of Inconsistent Judgments in *LabCorp*. In December 2010, the FTC challenged LabCorp's acquisition of Westcliff Medical Laboratories in Southern California. (The transaction had been approved under a June 2010 Bankruptcy Court sale order.) LabCorp filed a motion to dismiss and to transfer venue to the Central District of California.[35] In its brief in support of the motion, LabCorp cited *Cephalon* more than a dozen times, generally challenged the FTC's recent spate of forum-shopping, and argued that the FTC's choice of forum is not entitled to any particular deference where it has no meaningful ties to the controversy.[36]

The motion to transfer venue was granted, and a key reason, as in *Cephalon*, was the risk of inconsistent judgments. In November 2010, about 45 days before the FTC filed suit, LabCorp filed a declaratory judgment action in the Central District of California seeking declaratory and injunctive relief to prevent the FTC from "collaterally attacking" the Bankruptcy Court's earlier order.[37] This action established an ongoing court proceeding in a different forum, concerning the same issues and seeking a declaratory judgment that could result in an order directly in conflict with any injunction issued by the D.D.C. On top of this, the FTC had made an appearance in the Central District of California case and filed a motion to dismiss LabCorp's action.[38]

As in *Cephalon*, there was a clear risk of inconsistent judgments, and this weighed heavily in the court's decision to grant the motion to transfer.[39] In the Central District of California, the FTC's motion for an injunction was ultimately denied and the FTC decided not to pursue the case.[40]

Meaningful Ties in *H&R Block*. After *Microsemi*, in 2009–2011, the DOJ settled over 20 cases, almost all by consent decree. In May 2011, the DOJ filed a complaint in D.D.C. challenging H&R Block's proposed acquisition of TaxAct. The parties filed a motion to transfer the case to the Western District of Missouri, where H&R Block is based.

Like the merging parties in *Cephalon*, *Microsemi*, and *LabCorp*, H&R Block argued that the DOJ's action had no meaningful ties to D.D.C.[41] Unlike in those cases, however, the DOJ had identified "at least some relevant factual issues" relating to D.D.C.—the Internal Revenue Service is based there, and the DOJ alleged that one of TaxAct's key competitive initiatives involved collaborating with the IRS on the provision of free tax services.[42] Given these ties to D.D.C., the court followed "the ordinary rule" and gave "the plaintiff's choice of forum substantial deference."[43]

In denying H&R Block's motion to transfer, the court distinguished *Cephalon*, *Microsemi*, and *LabCorp* and explained that the reasons for transfer in those cases were not present in *H&R Block*.[44] Ultimately, the court granted the DOJ's request for a permanent injunction and the parties abandoned the transaction.[45]

Convenience in *Graco*. In December 2011, a month after the DOJ's victory in *H&R Block*, the FTC filed a complaint challenging Graco Inc.'s acquisition of the liquid refinishing business of Illinois Tool Works Inc. In *Graco*, the FTC filed in its home district (unlike *Microsemi*) and there was no pending litigation in other districts that could result in inconsistent judgments (unlike *LabCorp* and *Cephalon*). Nevertheless, following the clear trend established in *Microsemi*, *LabCorp*, and *H&R Block*, Graco filed a motion to transfer venue to the District of Minnesota.[46]

The FTC tried two arguments to preserve substantial deference to D.D.C., arguing: (1) because the case was filed to facilitate the FTC administrative proceeding in the District of Columbia, procedurally the case arose in D.C., and (2) because the relevant geographic market was national, competitive effects were national. The court did not accept that an FTC proceeding establishes ties to D.D.C., noting that there was "no legal support" provided for that position.[47] Regarding the FTC's argument that the relevant geographic market was national, the court actually viewed this as a reason that D.D.C. had no unique or meaningful connection to the action—all districts were subject to competitive effects equally.[48] These findings are important because they foreclose arguments that the agencies would have in essentially every merger challenge in D.D.C. (ongoing regulatory review, location of the agencies, and national importance of competitive effects).[49]

In granting a transfer to the District of Minnesota, the court found that the FTC's case had no meaningful ties to D.D.C. and therefore, consistent with the rulings on transfer in *Microsemi*, *LabCorp*, and *Cephalon*, the FTC's choice of forum was not entitled to substantial deference.[50]

Lessons from Recent Transfer Cases

Based on the recent cases discussed above, there are two key factors that have determined whether courts transfer a case.

Are There Meaningful Ties to D.D.C.? Based on the outcomes in *Microsemi*, *LabCorp*, *H&R Block*, and *Graco*, the single most important factor driving outcomes in transfer of venue motions is whether there is any meaningful nexus between the government's merger challenge and the district where the government files the challenge. In each of the three recent successful motions to transfer venue, because the government could not establish any meaningful nexus to the chosen forum, no (or very minimal) deference was afforded to the government's choice of forum, and the defendants succeeded in having the case transferred. In the one case where a motion to transfer failed (*H&R Block*), the government was able to establish a nexus to D.D.C. and the motion to transfer was denied.

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The "meaningful nexus" prerequisite to maintain deference for the plaintiff's chosen forum is very unhelpful to the DOJ and FTC. Even though the DOJ and FTC are based in Washington, D.C., and have historically filed merger challenges in D.D.C. with no challenge to venue, it is clear from the recent cases that DOJ's and FTC's local presence is not a significant factor in the Section 1404 analysis.[51] This is most clear from the transfer in *Graco*, where neither *Cephalon* factor was present—i.e., there was no explicit forum shopping as in *Microsemi* nor risk of inconsistent judgments as in *LabCorp*.

Are There Factors Weighing in Favor of Transfer? Even if there is little or no deference given to the government's choice of forum, courts are unlikely to transfer a case unless there is a reason to do so. The transfers in *Microsemi*, *LabCorp*, and *Graco* give merging parties a broad menu of factors to focus on, including the risk of inconsistent judgments, local geographic markets or competitive effects, or, as in *Graco*, simply convenience of the merging parties and witnesses:

- **Pending regulatory or legal proceedings.** Where merging parties can identify pending regulatory or legal proceedings in another district related to the transaction, this fact will weigh heavily in favor of transfer. The court in the district where the agencies filed will not in general have an incentive to review the facts and circumstances from scratch, and moreover the court will not want to interfere with the ongoing proceedings. On top of this, the court deciding whether to transfer a case in this circumstance will consider whether there is a risk of inconsistent judgments. Even if the government can establish a nexus between the transaction and its chosen forum, if there are pending proceedings in another district the case may well be transferred despite this.
- **Local/regional relevant markets.** If a case alleges harm to competition in a relevant market that is local or regional but the agency filed the complaint in D.D.C., the merging parties will have a good argument that the case should be transferred to a district court in the locality/region of the alleged relevant market. Even where relevant markets are national, it may still be possible to justify transfer following *Graco* and *Microsemi* because national competitive effects have been held insufficient to justify maintaining venue in D.D.C. This is especially the case if there are major or important customers or competitors in the region where the defendants are seeking to transfer the case (as was the case in *Graco*).[52]
- **Convenience of the parties and witnesses.** Courts have recognized that Section 1404 exists to correct the preference afforded to the government's choice of forum: "[I]t has been recognized by many that the existence of this preferential position of the Government was inherently unfair and needed modification in order that the Government and defendants might approach some degree of equality in this respect and that the defendants would have some rights in this matter."[53]

In assessing transfer motions under Section 1404, courts will consider and weigh the convenience of the parties and their witnesses, and if the government's choice of forum is not entitled to substantial deference, the outcome in *Graco* demonstrates that it does not take a significant showing of convenience for the parties to successfully obtain a transfer of venue. If other aspects of the transaction link it to a particular locale/district court—e.g., negotiation of the definitive agreements and choice of law provisions in those agreements—these factors will only make it more likely that the court will find transfer appropriate.[54]

Practical Guidance: Should You Seek to Have Your Case Transferred?

Given the recent success that merging parties have had in transferring merger challenges out of D.D.C, a natural question is whether merger parties should seek a transfer. Much like the substantive competitive assessment of any particular merger, this issue must be assessed on a case-by-case basis, but the following considerations are most relevant:

- **The agencies win in D.D.C.** The DOJ's and FTC's record in litigating merger cases is unambiguously better in D.D.C. (75 percent wins) than elsewhere (43 percent wins). As discussed above, there are likely multiple factors that have led to this result, but this statistic cannot be ignored in considering whether to litigate in D.D.C.

■ **Timing.** If time is of the essence, and in merger cases it often is, a transfer of venue may not be appropriate. The briefing and order on the motion to transfer can take up to a month or more, and, more importantly, there is significant uncertainty as to what the pace in the transferee court will be. In *Graco*, for example, after a successful motion to transfer the case to the District of Minnesota in January 2012 (a month after the case was filed), a scheduling conference was held in Minnesota in February 2012, where the judge informed the parties that the earliest available date for a hearing was in July 2012 (four months later).[55] The case settled in March 2012.[56]

■ **Precedent.** Parties should evaluate any precedents in merger cases specifically and antitrust cases generally of the district courts and circuit courts of appeal where the case might be transferred. Recent victories by the DOJ and FTC in D.D.C. (for example the DOJ's successful challenge in *H&R Block* and the FTC's victories in *CCC/Mitchell* and *Whole Foods*) are, on balance, unhelpful to merging parties.[57] The substantive law in other districts may be more advantageous to merging parties.

■ **Experience of court and judges.** Consistent with the enforcement statistics reported above, there will be very few, if any, recent precedents for government merger challenges in transferee districts and, consistent with this, courts outside of D.D.C. will be relatively unfamiliar with recent DOJ and FTC merger review. Given the relatively large number of cases filed in D.D.C. (31 litigated cases since 1992; for other district courts, no more than two in that timeframe), the judges in D.D.C. have significant experience with DOJ and FTC merger challenges—either by presiding over litigated challenges or by presiding over cases where the DOJ has settled a case and is seeking court approval of a settlement pursuant to the Tunney Act (176 times since 1992). Lack of experience outside of D.D.C. can be unhelpful to the parties where an explanation of complex market definition or competitive effects issues is necessary to explain away competition concerns, but it may be helpful if the local court is wary of government lawyers attempting to interfere in local business interests.[58] These factors should be weighed and considered.

■ **Convenience and costs.** Parties should consider actual convenience and the costs of trial. Although the merging parties (and witnesses) are typically based elsewhere in the United States, in most cases outside counsel will be based in Washington, D.C. Although courts ruling on transfer motions have explicitly declined to consider the convenience of counsel, the costs associated with outside counsel attending a trial can be significant.[59] When antitrust counsel are based in Washington, D.C., a two-week trial in California will be significantly more expensive for merging parties than a two-week trial in D.D.C.

In sum, a prudent default rule for merging parties facing a possible government merger challenge is to keep the option of transfer of venue open, consider alternative venues where the case may be transferred, and review the precedents in those districts. In an ideal scenario, to avoid surprises and delay upon transfer, the merging parties (or the court, as part of its analysis of the public interest factors) would check with the potential transferee court to assess likely scheduling upon transfer.

Conclusion

The precedents established in *Microsemi*, *LabCorp*, and especially *Graco* suggest the DOJ and FTC will see many more motions to transfer venue in future merger challenges.[60] Moreover, these precedents provide a sound basis for courts to grant these motions. Given the agencies' less successful record in merger challenges outside of D.D.C., this could be unwelcome news for the DOJ and FTC, but it is the result of a trend that started with the agencies' choices of forum in *Cephalon* and *Microsemi*. ■

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1 United States v. Microsemi Corp, 2009 WL 577491 (E.D. Va. 2009).

2 Motions to transfer venue under 28 U.S.C. § 1404 in Clayton Act challenges had been filed before, although decades ago. *See, e.g.*, United States v. Gen. Motors Corp., 183 F. Supp. 858 (1960); United States v. E.I. du Pont de Nemours & Co., 87 F. Supp. 962 (1950). 28 U.S.C. § 1404 was first applied in an antitrust case in United States v. Nat'l City Lines, Inc., 337 U.S. 78 (1949).

3 FTC v. Lab. Corp. of Am., Case 1:11-cv-00948-BAH, 39:19-40-12 (D.D.C. Dec. 3, 2010); United States v. H&R Block, 789 F. Supp. 2d 74 (D.D.C. 2011); FTC v. Graco, 2012 U.S. Dist. LEXIS 116826 (D.D.C. 2012).

4 FTC v. Cephalon, Inc., 551 F. Supp. 2d 21 (D.D.C. 2008).

5 FTC v. Watson Pharms., Inc., 611 F. Supp. 2d 1081, 1089 (C.D. Cal. 2009).

6 For the DOJ, to challenge a transaction under Section 7 of the Clayton Act, it must file a complaint in district court seeking a permanent injunction to prevent the parties from consummating the transaction. To prevent the parties from closing during the challenge, the DOJ must file either a motion for a temporary restraining order or a motion for a preliminary injunction (or both), which will temporarily prevent the parties from closing pending the outcome of a full trial on whether a permanent injunction should issue.

Unlike the DOJ, the FTC is an administrative agency that enforces the antitrust laws through administrative proceedings conducted by administrative law judges who are part of the FTC. To challenge a transaction under Section 7 of the Clayton Act, the FTC must file an administrative complaint seeking a permanent injunction that will prohibit the parties from consummating a transaction. Like a DOJ complaint in federal district court, the filing of an FTC administrative complaint will not prevent the parties from closing. To stop the parties from closing during the FTC's administrative proceedings, the FTC must, like the DOJ, seek a TRO and/or PI in district court.

7 15 U.S.C. § 22 (venue provision in the Clayton Act), and 15 U.S.C. § 53 (venue provision in the FTC Act).

8 15 U.S.C. § 22 (emphasis added).

9 Eastman Co. v. Southern Photo Co., 273 U.S. 359, 373–74 (1927) (interpreting Section 12 as an expansion of proper venue under the Clayton Act); *see also* United States v. Microsemi Corp., 2009 WL 577491, at *3–6 (E.D. Va. Mar. 4, 2009) (interpreting *Eastman* and other precedent) [hereinafter *Microsemi Transfer Opinion*].

10 15 U.S.C. § 53(b).

11 FTC v. Graco, 2012 U.S. Dist. LEXIS 116826, at *4–5 (D.D.C. 2012). In recent merger challenges, including in the cases involving venue transfer

motions described in further detail below, the merging parties have moved to dismiss the case for improper venue. These motions have generally focused on the defendants' lack of ties to the chosen forum. However, in each of these cases the court has interpreted the venue provisions of 15 U.S.C. § 22 and 15 U.S.C. § 53(b) very broadly, finding venue to be proper in each case. As discussed, where the connection to a chosen venue is very attenuated, courts are more likely to grant a motion to transfer venue to a more convenient (or appropriate) forum.

[12] Examples of litigated merger cases where the DOJ filed in the district where the merger parties were active include *United States v. UPM-Kymmene Oyj*, 2003 U.S. Dist. LEXIS 12820 (N.D. Ill. July 25, 2003) and *United States v. Engelhard Corp.*, 970 F. Supp. 1463 (M.D. Ga. 1997). Consent decrees are typically filed in D.D.C., although there, too, there are exceptions.

[13] In *Graco*, the FTC argued that venue would be proper in any judicial district, based on a combination of the broad FTC venue statute, 15 U.S.C. § 53(b); the general venue statute, 28 U.S.C. § 1391; and the broad service of process rules applicable to government cases in the Federal Rules of Civil Procedure. *See Graco*, 2012 U.S. Dist. LEXIS 116826 at *5–8.

[14] Although the focus of this article is not on the reasons for the DOJ's and FTC's success in litigated cases in D.D.C., there are a number of factors that could possibly explain the agencies' greater success in D.D.C., including (1) that judges in the District of Columbia are more familiar with government merger challenges, both based on the number of litigated cases and on the number of consent decrees filed; (2) Washington, D.C. is the "home turf" for the agencies; (3) no hospital merger cases have been brought in D.D.C., and the government has, at least historically, had less success in hospital merger cases.

[15] *See* cases cited *supra* note 2.

[16] *See generally* Van Dusen v. Barrack, 376 U.S. 612 (1964).

[17] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988) (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); *see also* FTC v. Cephalon, Inc., 551 F. Supp. 2d 21, 25 (D.D.C. 2008) (quoting Thayer/Patricof Educ. Funding, LLC v. Pryor Res., Inc., 196 F. Supp. 2d 21, 31–32 (D.D.C. 2002)).

[18] The public interest factors have not factored heavily in antitrust courts' assessment of transfer motions. In particular, all courts are generally presumed to be familiar with the antitrust laws, and the relative level of congestion at courts has not been a significant element in assessments of transfer motions. The third public interest factor—the local interest in deciding local controversies at home—typically cuts in the same direction as the private interest factor of where the claim arose.

[19] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1950); *Microsemi Transfer Opinion*, *supra* note 11, at *6 ("[T]he impermissible result to be avoided is simply to shift the balance of inconvenience from the plaintiff to the defendant.") (citing Coors Brewing Co. v. Oak Beverage Co., 549 F. Supp. 2d 764, 772 (E.D. Va. 2008)).

[20] Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950); United States. v. Brown Univ., 772 F. Supp. 241, 242 (E.D. Pa. 1994); Expoconsul Int'l Inc. v. A/E Sys., Inc., 711 F. Supp. 730, 735 (S.D.N.Y. 1989).

[21] *See* FTC v. Cephalon, Inc., 551 F. Supp. 2d 21, 23 (D.D.C. 2008) (ruling on transfer motion).

[22] *Id.* at 24.

[23] *Id.* at 30 ("In its filings before this Court, the Commission has not admitted that it brought this action in the District of Columbia to further its goal of obtaining a circuit split. At least one Commissioner, however, has conceded that it is 'a matter of public knowledge that [FTC is] looking to bring a case that will create a clearer split in the circuits.'") (citing Oral Statement of Commissioner Jon Leibowitz at 3, Hearing of the Senate Judiciary Committee (Jan. 17, 2007), *available at* http://www.ftc.gov/speeches/leibowitz/071701oralstate ment.pdf).

[24] *Watson*, 611 F. Supp. 2d at 1086.

[25] *Cephalon*, 551 F. Supp. 2d at 27.

[26] *Id.* at 26 (citing Thayer/Patricof Educ. Funding, 196 F. Supp. 2d 21, 31 (D.D.C. 2002); United States v. Brown Univ., 772 F. Supp. 241, 242 (E.D. Pa. 1991)) (internal citations omitted).

[27] *Id.* at 29.

[28] *Id.*

[29] FTC's Opposition to Cephalon's Motion to Transfer at 9, FTC v. Cephalon, Inc., Case 1:08-cv-00244 (JDB) (Mar. 6, 2008), http://www.ftc.gov/os/caselist/0610182/080306oppositiontomotiontotransfer.pdf.

[30] *Cephalon*, 551 F. Supp. 2d at 29; Barham v. UBS Fin. Servs., 496 F. Supp. 2d 174, 180 (D.D.C. 2007) ("[T]he fact that there is an ongoing case dealing with similar issues in another jurisdiction weighs very heavily in favor of a transfer under § 1404(a)"); Cal. Farm Bureau Fed'n v. Badgley, 2005 WL 1532718, *2 (D.D.C. June 29, 2005); Holland v. A.T. Massey Coal, 360 F. Supp. 2d 72, 77 (D.D.C. 2004).

[31] *See* Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, United States v. Microsemi Corp., Civil Action No. 1:08-cv-1311 (Dec. 22, 2008).

[32] *Microsemi Transfer Opinion*, *supra* note 11, at *2–6.

[33] *Id.* at *7 (citing Koh v. Microtek Int'l, Inc., 250 F. Supp. 2d 627, 635 (E.D. Va. 2003) ("[I]f there is little connection between the claims and [the chosen forum], that would militate against a plaintiff's chosen forum and weigh in favor of transfer to a venue with more substantial contacts.")).

[34] Press Release, Department of Justice, Justice Department Reaches Settlement with Microsemi Corp. (Aug. 20, 2009), http://www.justice.gov/opa/pr/2009/August/09-at-828.html.

[35] *Id.* at 1.

[36] Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss for Improper Venue or Failing to Sue the Acquirer of Assets, or in the Alternative, to Transfer Venue, FTC v. Laboratory Corp. of Am., Case 1:10-cv-02053-RWR, 8-9, 18-19 (Dec. 2, 2010) [hereinafter *LabCorp Brief in Support*].

[37] Complaint, Labwest, Inc. & Lab. Corp. of Am. v. FTC, Case No. 8:10-bk-16743-RK (Nov. 16, 2010).

[38] Transcript of Temporary Restraining Order Proceedings, FTC v. Lab. Corp. of Am., Case 1:11-cv-00948-BAH, 39:19-40-12 (Dec. 3, 2010) [hereinafter *LabCorp Hearing*].

[39] *Id.* at 40–41.

[40] Order Denying Preliminary Injunction, FTC v. Lab. Corp. of Am., Case 8:10-cv-01873-AG-MLG (Feb. 22, 2011).

[41] *H&R Block*, 789 F. Supp. 2d at 79.

[42] *Id.*

[43] *Id.* at 80.

[44] *Id.* at 84–85 (citing *Microsemi*, 2009 WL 577491 at *6).

[45] The motion for a preliminary injunction was consolidated with the trial on whether to grant a permanent injunction. *See* Tom Schoenberg, *H&R Block Can't Proceed with TaxAct Maker Deal, Judge Rules*, BLOOMBERG (Nov. 1, 2011), http://www.bloomberg.com/news/2011-10-31/h-r-block-purchase-of-taxact-maker-blocked-by-federal-judge.html.

[46] Graco also moved to dismiss for lack of personal jurisdiction and improper venue. These motions were denied.

[47] *Graco*, 2012 U.S. Dist. LEXIS 116826 at *16 (citing Berenson v. Nat'l Fin. Servs., LLC, 319 F. Supp. 2d 1, 4 (D.D.C. 2004)).

[48] *Id.* at *15.

[49] Four years earlier, the *Microsemi* court recognized this as well, noting that "[i]n fact, even when an involved government agency is located in the selected district, deference has not been extended to that government agency's choice of that district when the controversy itself had no meaningful ties to that forum." *Microsemi Transfer Opinion*, *supra* note 11, at *7 (citing *Cephalon*, 551 F. Supp. 2d at 26).

[50] *Graco*, 2012 U.S. Dist. LEXIS 116826 at *14 (citing Greater Yellowstone Coalition v. Bosworth, 180 F. Supp. 2d 124, 128 (D.D.C. 2001) (deference "is mitigated where 'the plaintiff's choice of forum has no meaningful ties to the controversy and not particular interest in the parties or subject matter.'"). Following the transfer to the District of Minnesota, the parties agreed

to settle with the FTC.

[51] *Id.* at *15–16; *Microsemi Transfer Opinion*, *supra* note 11, at *7 (citing *Cephalon*, 551 F. Supp. 2d at 26).

[52] *Graco*, 2012 U.S. Dist. LEXIS 116826 at *15.

[53] *LabCorp Brief in Support*, *supra* note 36, at 18 (citing United States v. E.I. du Pont de Nemours & Co., 83 F. Supp. 233, 234–35 (D.D.C. 1949)).

[54] Although this factor has been secondary in recent cases, courts will evaluate where the transaction was negotiated and signed, and whether a transaction can really be tied to a particular locale because of the history of the transaction or even by reference to "choice of law" for aspects of the transaction agreement. If a record has been established linking a transaction to a particular venue, this suggests successful transfer is more likely.

[55] Transcript, Status Conference, FTC v. Graco, Case 12-CV-307 (PJS/AJB) (D. Minn. Feb. 16, 2012).

[56] *See* Press Release, Fed Trade Comm'n, FTC Orders Graco Inc. to Hold Separate Worldwide Liquid Finishing Equipment Businesses It Is Acquiring from Rival, ITW (Mar. 27, 2012), http://www.ftc.gov/opa/2012/03/graco.shtm.

[57] *See* FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009); FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007).

[58] An example of this is the FTC's challenge of the merger of Freeman Hospital and Oak Hill Hospital in Joplin, Missouri. There, in denying a PI, the district court noted: "It looks to me like Washington, D.C. once again thinks they know better what's going on in southwest Missouri. I think they ought to stay in D.C." *See* FTC v. Freeman Hosp., 69 F.3d 260, 263 (8th Cir. 1995) (citing Temp. Restraining Order Hrg. Tr. at 27–29 (Feb. 22, 1995)).

[59] LabCorp Hearing, *supra* note 38, at 12:21–13:8.

[60] In the three most recent challenges filed in D.D.C., *Ardagh/St. Gobain*, *AB/InBEV/Modelo*, and *U.S. Air/American*, no motion to transfer venue was filed. *See* FTC v. Ardagh Group S.A., Case 1:13-cv-01021-RMC (D.D.C. July 17, 2013); United States v. Anheuser-Busch InBEV SA/NV, et al., Case 1:13-cv-00127 (D.D.C. Jan. 31, 2013); United States v. U.S. Airways Group, Inc., Case 1:13-cv-01236 (D.D.C. Aug. 13, 2013).