

Leaving Time to Litigate: Lessons from Recent Merger Challenges

Farrell J. Malone and Ian C. Thresher

It is well-known that high-profile strategic mergers and acquisitions are subject to close scrutiny by the Antitrust Division of the Department of Justice or the Federal Trade Commission and that the regulatory review could take months to a year or more. In recent years, regulatory reviews of over a year have become commonplace, and the agencies' leadership have taken notice: just recently, the Assistant Attorney General for Antitrust, Makan Delrahim, announced that the Antitrust Division is planning to implement procedural changes intended to expedite the merger review process and avoid unnecessarily lengthy regulatory reviews.¹ Although it will be interesting to see if the proposed changes speed up the average review timeline, AAG Delrahim explicitly noted that “[s]ome transactions present knotty problems and it takes a while to untangle them.”² In other words, for high-profile, strategic transactions that raise “knotty antitrust problems,” delay in the antitrust regulatory review may seem inevitable.

To reduce possible uncertainty and delay, parties often negotiate precisely what efforts or actions they must take to obtain antitrust clearance, including, for example, whether divestitures must be offered to resolve antitrust concerns and whether the parties must litigate if the transaction is challenged in court. Sometimes the parties agree that a specific “break” fee or termination fee will become due if a deal fails because of an antitrust challenge. These “antitrust risk” provisions in strategic transactions are important for deal certainty and are often heavily negotiated.

There is another agreement provision in strategic deals, however, that can take on even more importance than the antitrust risk provisions: the termination date, or outside date. Although it may vary in name, the outside date is often a defined term in the transaction agreement and is the date by which one party may unilaterally terminate the transaction if antitrust approval has not been obtained, even if the parties are in the midst of ongoing litigation with the DOJ or the FTC. Typically, if the antitrust review (or any challenge to the transaction) is ongoing as of the outside date, either the parties must mutually agree to extend the outside date or a party to the transaction will have a unilateral “walk” right to terminate the agreement, possibly triggering a hefty termination fee payment.

In recent years, there have been several high-profile merger challenges where one or both parties terminated the agreement either in the middle of litigation (Halliburton/Baker Hughes and GE/Electrolux) or while the parties were considering appeals (Anthem/Cigna and Aetna/Humana). A common factor in all four of these cases is that the parties (or party, where there was a unilat-

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¹ Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, It Takes Two: Modernizing the Merger Review Process, Remarks at the 2018 Global Antitrust Enforcement Symposium (Sept. 25, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust>.

² *Id.*

eral termination) ran out of time in the middle of the government's antitrust challenge. This article addresses this phenomenon and provides practical guidance for parties to consider when negotiating the outside date and managing a detailed antitrust regulatory review.

Problem: Not Enough Time to Litigate

The DOJ's recent challenge and subsequent appeal of AT&T's proposed \$85 billion acquisition of Time Warner is the most recent example of the "leaving time to litigate" issue.³ The transaction was highly publicized as the first court challenge to a purely "vertical" deal in decades—the last time the government successfully blocked a vertical deal on antitrust grounds was almost 46 years ago, during the Nixon administration.⁴

But AT&T/Time Warner is also notable for another reason: it is at least the fifth major transaction since 2015 where the antitrust regulatory review, in each case including a court challenge, extended past the "Termination Date" that the parties originally agreed to in their transaction agreement. (There is now a sixth ongoing—Tronox/Cristal, discussed below).⁵

In AT&T/Time Warner, the parties initially set April 22, 2018, as the outside date, 18 months from the date of signing.⁶ However, District Court Judge Richard Leon scheduled the trial to start on March 19, 2018—just one month before the outside date. Moreover, during a December 2017 hearing, Judge Leon said he expected that the trial would take about three weeks, with a decision to come in late April or May, and in any event after the April 22 outside date.⁷

Following that December hearing, the merging parties agreed to extend the outside date in their transaction agreement by another two months, to June 21, 2018.⁸ Following closing arguments in the trial, Judge Leon (quoting composer Leonard Bernstein) facetiously remarked, "To achieve great things, two things are needed: a plan and not quite enough time." At around the same time, Judge Leon announced that his decision would come on June 12, 2018, a mere 11 days before the termination date in the agreement.⁹ As scheduled, Judge Leon issued his decision on the merger challenge on June 12, finding in favor of the parties, clearing the way for the transaction to proceed (subject to an appeal by the DOJ, which is still ongoing as of the writing of this article).¹⁰

³ United States v. AT&T Inc., No. 1:17CV02511, 2018 WL 3752091, (D.D.C. June 12, 2018).

⁴ See *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

⁵ Lengthy antitrust reviews are not merely a recent phenomenon—the trend toward more lengthy and involved (and document-intensive) antitrust reviews has continued off and on since at least 2000. The focus of this article is on the more recent phenomenon of large strategic transactions failing because of the length of the antitrust review.

⁶ See AT&T Inc., Form 8-K, Exhibit 2.1, Agreement and Plan of Merger Among Time Warner Inc., AT&T Inc., and West Merger Sub. Inc. (Oct. 22, 2016) (§ 8.2 is defined as "Termination by Either Parent or the Company. This Agreement may be terminated and the Mergers may be abandoned . . . by action of the Board of Directors of either Parent or the Company if (a) the Initial Merger shall not have been consummated by October 22, 2017 (as it may be extended below, the "Termination Date") . . . ; provided that if on such date any of the Required Governmental Consents shall not have been obtained, the Termination Date may be extended one or more times by the Company or Parent from time to time by written notice to the other party up to a date (or dates) on or before April 22, 2018 . . .").

⁷ At a preliminary hearing on December 7, 2017, Judge Leon said, "It's just not realistic to be done on the 22nd." Brent Kendall, *Judge Sets March 19 as Start Date for AT&T-Time Warner Antitrust Trial*, WALL ST. J., Dec. 7, 2017, <https://www.wsj.com/articles/at-t-time-warner-spar-with-government-over-trial-start-date-1512652679>.

⁸ AT&T Inc., Form 8-K (Dec. 21, 2017).

⁹ Diane Bartz, *U.S. Judge Mulling Compromise Decisions on AT&T-Time Warner Deal*, REUTERS (Apr. 30, 2018), <https://www.reuters.com/article/us-time-warner-m-a-at-t/u-s-judge-mulling-compromise-decision-on-att-time-warner-deal-idUSKBN1110SP>.

¹⁰ Hadas Gold, *Justice Department Lays Out Roadmap to Appeal of AT&T-Time Warner Deal*, CNN (Aug. 6, 2018), <https://money.cnn.com/2018/08/06/media/doj-att-time-warner-appeal/index.html>.

AT&T and Time Warner closed the transaction two days later, but needed to work with the DOJ to make that happen. In exchange for a DOJ promise not to seek an emergency court order that would prevent the deal from closing, a move that would effectively push the closing date past the outside date, AT&T promised to operate Time Warner's Turner Broadcasting as a separate business unit until 2019.¹¹ AT&T and Time Warner had little choice but to agree to this arrangement. On July 12, one month after Judge Leon's decision, the DOJ filed its notice of appeal.¹²

Although AT&T and Time Warner were able to mutually agree to an extension that allowed sufficient time for a decision in the district court, the timing of trial and Judge Leon's explicit statement that a decision would not come before the parties' then-current termination date, could have been fatal to the transaction. The same could be said for the DOJ's subsequent threat to seek an emergency injunction if AT&T did not agree to temporarily operate Turner Broadcasting as a separate entity.

Similar issues have arisen in cases challenged by the FTC. In the Tronox/Cristal merger, after an FTC administrative challenge to that transaction,¹³ the parties had to agree to an extension of the outside date in their original agreement, making Tronox/Cristal a sixth recent example of merger parties having to extend their merger agreement while an antitrust challenge is pending.

This timing issue has proven fatal to several high-profile transactions in recent years. As summarized in the table below, there have been at least four major transactions where one or both parties abandoned the transaction on or after the outside date.

Table 1: Transactions Where Litigation Extended Beyond Original Outside Date

Transaction	Date Signed & Date of Complaint	Months to Complaint	Date a Party Could Terminate (Date Terminated)	Months to Termination/Completion
Examples of Transactions with Challenges/Appeals Pending				
Tronox/Cristal	February 21, 2017 to December 5, 2017	~9.5 months (287 days)	May 21, 2018 1st Extension: June 30, 2018 Automatic three-month extensions until March 31, 2019	Trial completed on September 14. Post-trial Briefs submitted on September 17
AT&T/ Time Warner	October 22, 2016 to November 20, 2017	~13 months (394 days)	Original: October 22, 2017 1st Extension: April 22, 2018 2nd Extension: June 21, 2018	~20 months (598 days)
Examples of Transactions that Were Terminated				
Anthem/Cigna	July 23, 2015 to July 21, 2016	~12 months (364 days)	Original: January 31, 2017 1st Extension: April 30, 2017 (May 12, 2017)	~22 months (659 days)
Aetna/Humana	July 3, 2015 to July 21, 2016	~12.5 months (385 days)	Original: June 30, 2016 1st Extension: December 31, 2016 2nd Extension: February 15, 2017 (February 14, 2017)	~19.5 months (582 days)

continued

¹¹ David McLaughlin & Andrew M. Harris, *U.S. Justice Department Says It's Appealing AT&T-Time Warner Merger Decision*, BLOOMBERG (July 12, 2018), <https://www.bloomberg.com/news/articles/2018-07-12/u-s-justice-department-says-it-s-appealing-at-t-merger-defeat>.

¹² *Id.*

¹³ Memorandum Opinion, *FTC v. Tronox Ltd.*, No. 1:18-CV-01622 (TNM), 2018 WL 4353660 (D.D.C. Sept. 12, 2018).

Table 1: Transactions Where Litigation Extended Beyond Original Outside Date *continued*

Transaction	Date Signed & Date of Complaint	Months to Complaint	Date a Party Could Terminate (Date Terminated)	Months to Termination/Completion
<i>Examples of Transactions that Were Terminated</i> <i>continued</i>				
Halliburton/Baker Hughes	November 17, 2014 to April 6, 2016	~17 months (506 days)	Original: October 30, 2015 1st Extension: December 15, 2015 2nd Extension: April 30, 2016 (May 1, 2016)	~17.5 months (531 days)
GE/Electrolux	September 8, 2014 to July 1, 2015	~10 months (297 days)	December 7, 2015 ¹⁴ (December 7, 2015)	~15 months (456 days)
Average		~12.4 months (372 days)		~19 months (565 days)

[T]he average time from announcement to termination (including any trial period pre-termination) has been over 18 months—and this period has been steadily growing.

There are common themes in these transactions. First, they each involved substantively difficult antitrust issues, ultimately resulting in a merger challenge in court. Second, the time period between the announcement of the transaction and filing of the district court complaint has been very long—over a year on average. Third, the average time from announcement to termination (including any trial period pre-termination) has been over 18 months—and this period has been steadily growing. Most importantly, in each case, at least one of the parties chose to terminate the agreement (in some cases receiving a substantial termination fee), at or after the outside date, rather than continue to fight for antitrust clearance.¹⁵

The path to termination and the posture of the parties at the time of termination was different in each case. Anthem/Cigna, one of the two major health care deals announced in 2015, may be the best example of one party running out of time mid-challenge. The press was reporting tension between the parties from the outset, and it was widely reported that Cigna wanted out of the deal.¹⁶

On January 19, 2017, with tensions between the parties apparently escalating, Anthem extended the agreement by three months, to April 30, 2017.¹⁷ Per the terms of the merger agreement,

¹⁴ For GE/Electrolux, the agreement is not public and thus the precise outside date is unknown, but the agreement permitted GE to terminate at least by December 7, 2015, and maybe earlier if GE waited some time before terminating. Simon Johnson & Diane Bartz, *GE Calls Off Electrolux Appliance Deal Amid U.S. Antitrust Fight*, REUTERS (Dec. 6, 2015), <https://www.reuters.com/article/us-ge-equity-electrolux/ge-calls-off-electrolux-appliance-deal-amid-u-s-antitrust-fight-idUSKBN0TQ0MP20151207>.

¹⁵ All four of these transactions were terminated on or around the effective termination dates in the parties' merger agreements. Tronox/Cristal, like AT&T/Time Warner, narrowly avoided this fate when both parties agreed to extend their merger agreement on March 1, 2018. See Tronox Ltd., *Tronox Announces Extension to Cristal TiO2 Acquisition Agreement*, PR NEWSWIRE (Mar. 1, 2018), <https://www.prnewswire.com/news-releases/tronox-announces-extension-to-cristal-tio2-acquisition-agreement-300606364.html>.

¹⁶ Brent Kendall & Anna Wilde Mathews, *Testimony Shows Anthem and Cigna at Odds over Proposed Merger*, WALL ST. J. (Nov. 28, 2016), <https://www.wsj.com/articles/testimony-shows-anthem-and-cigna-at-odds-over-proposed-merger-1480373327>; Bruce Japsen, *Cigna Wants Out of Anthem Deal and \$13B in Damages*, FORBES (Feb. 14, 2017), <https://www.forbes.com/sites/brucejapsen/2017/02/14/cigna-wants-out-of-anthem-deal-and-13b-in-damages/#2a07d21b4d41>. See also Caroline Humer & Diane Bartz, *Aetna, Humana Drop Merger; Cigna Wants to End Anthem Deal*, REUTERS (Feb. 14, 2017), <https://www.reuters.com/article/us-humana-m-a-aetna/aetna-humana-drop-merger-cigna-wants-to-end-anthem-deal-idUSKBN15T1HN>.

¹⁷ Caroline Hummer, *Anthem Extends Cigna Deal Closing Date Ahead of Court Ruling*, REUTERS (Jan. 19, 2017), <https://www.reuters.com/article/us-cigna-m-a-anthem/anthem-extends-cigna-deal-closing-date-ahead-of-court-ruling-idUSKBN1531YS>.

Anthem (or Cigna) could unilaterally extend the agreement only once,¹⁸ and given the tension between the parties it seemed likely that Cigna would seek to terminate on April 30 if clearance was not obtained. Sure enough, after the district court ruled against the parties on February 8, 2016, Cigna attempted to terminate the agreement.¹⁹ Although Anthem forged ahead with an appeal, it was left with under three months to win the appeal before the April 30 outside date. Despite initially winning a temporary injunction preventing Cigna from terminating, a Delaware court eventually ruled in Cigna's favor, allowing termination, on May 11.²⁰ Cigna announced it had terminated the next day.²¹

The Aetna/Humana merger followed a similar timetable. As in Anthem/Cigna, Aetna and Humana reached an agreement to merge in July 2015. After a year-long antitrust review, on July 21, 2016, the DOJ filed a complaint to block the merger. By that time Aetna and Humana had already been forced to extend the outside date until December 31, 2016, something they had to do again during the trial. (The second time they extended the agreement to February 15, 2017.)²² After a two-month trial, the district court ruled against the parties on January 23, 2017.

Although Aetna Chairman Mark Bertolini said that Aetna was mulling an appeal of the court's ruling and vowed to review the decision up to the February 15 outside date, neither party appealed.²³ Instead, Aetna and Humana issued a joint press release on February 8 announcing that they had mutually agreed to abandon the merger. Bertolini's statements, though, raise at least the possibility that Aetna opted not to appeal because the parties could not reach an agreement on another extension of the outside date that would last beyond the appellate court's review and decision.

The DOJ's review of the Halliburton/Baker Hughes merger—a \$35 billion merger announced in November 2014 that would have created the world's largest oil and gas field services company—took almost 17 months. When it finally filed its complaint, the DOJ alleged that the transaction would harm competition in 23 different relevant markets in the global well-drilling and oil-construction services industry.²⁴

Given the lengthy review period, Halliburton and Baker Hughes needed to extend the outside date in their agreement twice, and, on the second occasion, extended it the maximum amount permitted under the agreement, to April 30, 2016. Even then, the DOJ's complaint came only on April 6, 2016, just about three weeks before the extended outside date. On May 1, both sides issued a press release indicating the parties were terminating the agreement. The decision may

¹⁸ See Anthem, Inc. and Cigna Corp., Form 8-K, Exhibit 2.1, Agreement and Plan of Merger among Anthem, Inc., Anthem Merger Sub Corp., and Cigna Corporation § 7.1 (b) (July 23, 2015).

¹⁹ Aaron Smith & Jackie Wattles, *Aetna-Humana & Anthem-Cigna: Two Mergers Die in One Day*, CNN (Feb. 14, 2017), <http://money.cnn.com/2017/02/14/investing/aetna-humana/index.html>.

²⁰ *Delaware Judge Denies Anthem Injunction, Effectively Ending Cigna Merger*, REUTERS (May 11, 2017), <https://www.reuters.com/article/us-cigna-m-a-anthem/delaware-judge-denies-anthem-injunction-effectively-ending-cigna-merger-idUSKBN1872WZ>.

²¹ Press Release, Cigna Corporation Announces Termination of Anthem Transaction (May 12, 2017), https://cigna.newshq.businesswire.com/press-release/cigna-corporation-announces-termination-anthem-transaction?WT.z_nav=newsroom%2Fnewsreleases%2F2017%2Fcigna-corporation-announces-termination-of-anthem-transaction%3Bbody%3Bhttp%3A%2F%2Fcigna.newshq.businesswire.com%2Fpress-release%2Fcigna-corporation-announces-termination-anthem-transaction.

²² Shelby Livingston, *Aetna and Humana Extend Merger Deadline Again*, MODERN HEALTHCARE (Dec. 22, 2016), <http://www.modernhealthcare.com/article/20161222/NEWS/161229973>.

²³ Bruce Japsen, *Aetna May Appeal Ruling Blocking Humana Deal*, FORBES (Jan. 31, 2017), <https://www.forbes.com/sites/brucejapsen/2017/01/31/aetna-may-appeal-ruling-blocking-humana-deal/#7be199f45410>.

²⁴ Complaint, *United States v. Halliburton*, No. 1:16CV00233-UNA, 2016 WL 1366334 (D. Del. Apr. 6, 2016).

have been motivated as much by a changed marketplace (affecting deal economics) as it was by the government's complaint.²⁵ Moreover, the lengthy review period (almost 17 months) raises questions about what might have happened had Halliburton and Baker Hughes been more proactive in encouraging the DOJ to expedite its review (See the discussion in the Solutions section below).

Nonetheless, the termination was not a complete loss for Baker Hughes. The company received a \$3.5 billion breakup fee from Halliburton and was later acquired by GE.²⁶ Although it is impossible to say for certain that it was Baker Hughes's decision to terminate the deal, the large breakup fee coupled with the fact that the termination came on the first day that either party could walk away makes it plausible that Baker Hughes acted more unilaterally in ending the deal than the parties' press releases would suggest.²⁷

An impending outside date also provides an "out" for a party concerned about the costs or possible unfavorable outcome of litigation. Take, for instance, the failed GE/Electrolux merger in 2015. In that case, the DOJ filed a complaint after a nearly ten-month review. Trial started four months later, but as the fourth week of trial got underway, on December 7, GE announced it was terminating the transaction.²⁸ There were, according to GE, several interested buyers in GE's appliances division, and the prospect of a protracted appeals process (and a \$175 million termination fee payment) likely entered into GE's decision to terminate.²⁹ When GE later sold its appliances division to Haier, a GE spokesman stated that GE did not foresee any antitrust issues like they did with Electrolux.³⁰

Although these examples are the most recent merger cases where one party was able to walk away from the deal, or where circumstances changed such that the parties chose not to proceed with the deal, the same timing considerations apply generally as well—antitrust reviews are simply taking longer. Specifically, since 2011, there have been 190 merger enforcement actions, defined as cases that involved either a remedy or a court challenge (or both).³¹ The trend in these

²⁵ A Halliburton Press Release quotes Halliburton Chairman and CEO Dave Lesar as saying, "While both companies expected the proposed merger to result in compelling benefits to shareholders, customers and other stakeholders, challenges in obtaining remaining regulatory approvals and general industry conditions that severely damaged deal economics led to the conclusion that termination is the best course of action." Press Release, Halliburton and Baker Hughes Announce Termination of Merger Agreement, (May 1, 2016), https://www.halliburton.com/content/dam/halliburton/public/news/pubsdata/press_release/2016/halliburton-baker-hughes-terminate-merger.html.

²⁶ *GE Closes Baker Hughes Deal, Becomes No. 2 Oilfield Service Provider*, REUTERS (July 3, 2017), <https://www.reuters.com/article/us-baker-hughes-m-a-ge/ge-closes-baker-hughes-deal-becomes-no-2-oilfield-service-provider-idUSKBN1901RJ>.

²⁷ Halliburton/Baker Hughes highlights another critical timing factor in high-profile, global strategic deals: the need for merger approvals outside the United States. Although this article is focused on U.S. reviews, the DOJ was not the only entity investigating the Halliburton/Baker Hughes merger. Like many of these transactions, the parties required additional approvals in the EU and elsewhere. Those reviews are also lengthy: the EU filing in Halliburton/Baker Hughes, for example, was not accepted until July 2015, eight months after signing, and the case entered Phase II, signaling a more in-depth investigation, only in January 2016, which was months after the parties' original outside date. In short, the timing concerns related to lengthy antitrust reviews are not unique to the United States and are indeed compounded where the parties face multiple foreign antitrust hurdles as well. See, e.g., Tom Fairless, *Halliburton-Baker Hughes Merger Under EU Antitrust Review*, WALL ST. J. (Jan. 12, 2016), <https://www.wsj.com/articles/halliburton-baker-hughes-merger-under-eu-antitrust-review-1452624062>.

²⁸ Simon Johnson & Diane Bartz, *GE Calls Off Electrolux Appliance Deal Amid U.S. Antitrust Fight*, REUTERS (Dec. 6, 2015), <https://www.reuters.com/article/us-ge-equity-electrolux-idUSKBN0TQOMP20151207>.

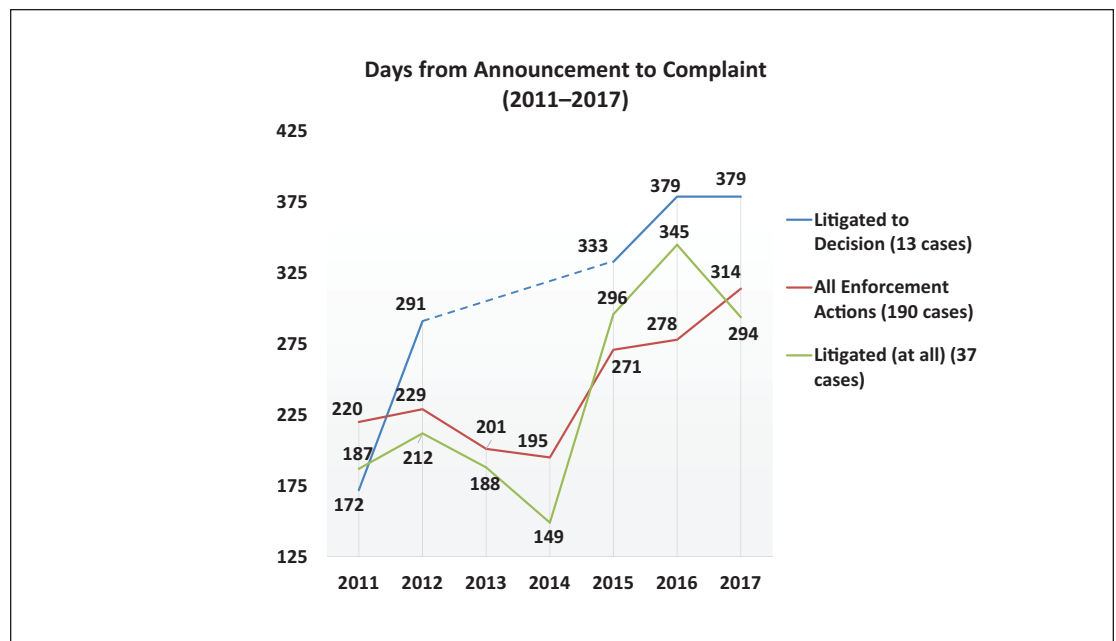
²⁹ See *id.*

³⁰ Amie Tsang, *G.E. to Sell Appliance Division to Haier for \$5.4 Billion*, N.Y. TIMES (Jan. 15, 2016), <https://www.nytimes.com/2016/01/16/business/dealbook/haier-ge-appliances.html>.

³¹ There were 190 total enforcement actions against proposed mergers from 2011–2017. In 37 of those cases, there was not a contemporaneous settlement (and thus, at least initially, it appeared that the parties would contest the challenge). The merging parties abandoned the transaction or later reached a settlement with the government in 24 of those 37 cases. In the other 13 cases, there was a decision on the

cases is clear—investigations, especially in transactions that are litigated to a decision in the district court, are growing significantly longer:

- Across all merger enforcement actions, the average time from a transaction’s announcement to the filing of the complaint (or settlement) has increased by about three months, from seven months in 2011 to more than ten months in 2017.³²
- In the 37 challenges that did not involve a contemporaneous settlement (i.e., where the parties were in a litigation posture), the average length of the investigation has increased by three-and-a-half months, from about six months in 2011 to over nine-and-a-half months in 2017.
- In the 13 cases that were litigated to a decision, the increasing length of the investigation was even more significant—an increase of almost six months, from about five-and-a-half months in 2011 to over a year in 2017.³³



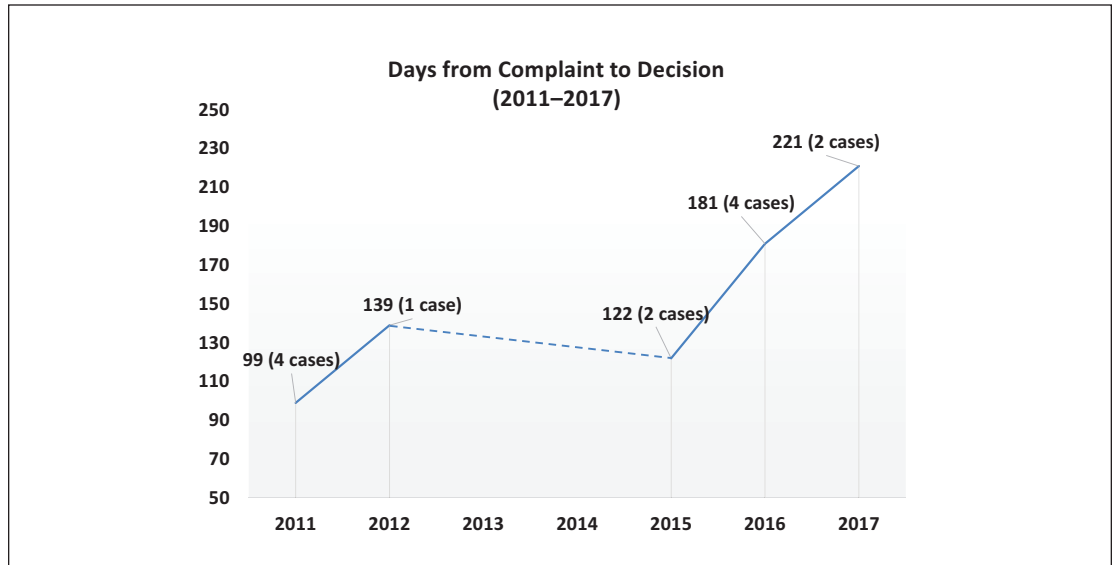
- Longer investigations do not necessarily translate into faster trial outcomes. As shown in the figure below, among the 13 cases that were litigated to a decision in 2011–2017, the average time from the filing of a complaint until a district court’s decision on the merits has increased from 99 days in 2011 to as high as 221 days in 2017.³⁴

merits in the district court. Note that while there was a final decision on the merits in the Bazaarvoice/PowerReviews and St. Luke’s/Saltzer Medical Group mergers, these cases were not included in the charts below because they were consummated prior to the DOJ and FTC enforcement action.

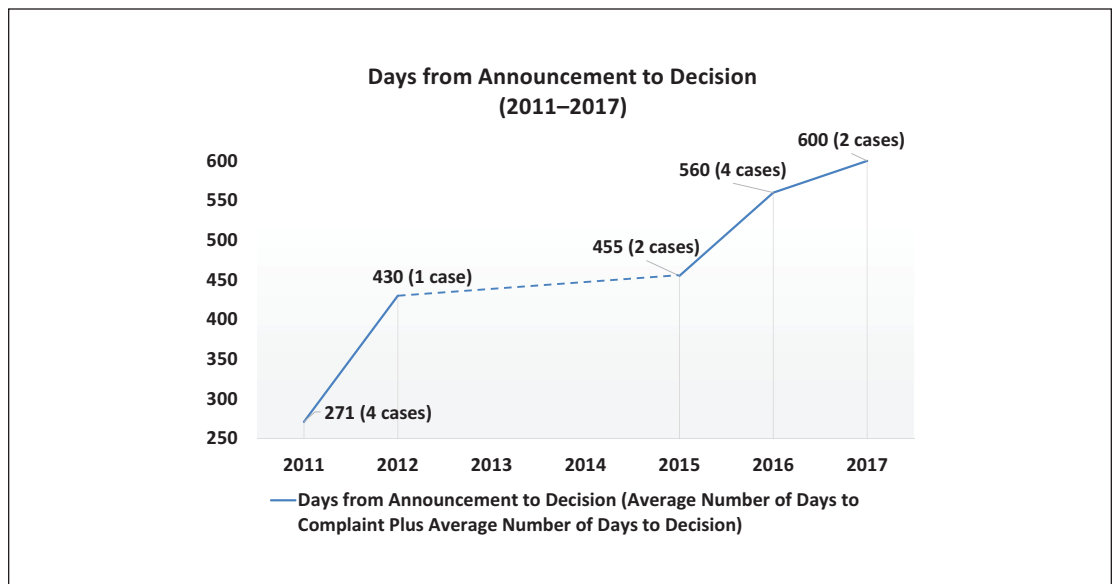
³² In 2007, the Antitrust Modernization Commission reported that the time needed for review of a transaction and receipt of approval could be up to “six months or longer.” See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 152 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

³³ See Bureau of Competition, Fed. Trade Comm’n & Antitrust Div., Dep’t of Justice, Hart-Scott-Rodino Annual Report-Fiscal Years 2011–17, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

³⁴ The following two graphs use data from 13 enforcement actions between 2011 and 2017. As noted above, *see supra* note 31, the Bazaarvoice/PowerReviews and St. Luke’s/Saltzer Medical Group mergers were not included in this data because those were consummated mergers and therefore the merger review was necessarily on a different timeframe. The breakdown by year is four cases in 2011, one case in 2012, two cases in 2015, four cases in 2016, and two cases in 2017.



- Taken together, companies hoping to weather both the government's investigation and any challenge in court could see a total review period that is 11 months longer than in 2011.



Solutions: Creating or Leaving Time to Litigate

The recent strategic transactions that were terminated mid-challenge involved complex antitrust issues that inevitably take time to resolve. The parties surely knew that at the time of signing, so one would expect that the antitrust risk provisions, the requirement that the parties litigate to resolve any antitrust concerns, and the outside date agreed between the parties reflected their interest in, and willingness to fight for, the transaction. Regardless, in each of the terminated transactions described above, the parties (or one of the parties) either ran out of time, lost interest in the transaction, or both. The outcomes in these cases could have been different if the parties had (1) created more time to litigate at the outset of the transaction, by specifically negotiating for it in the transaction agreement and/or (2) left more time to litigate, by explicitly and efficiently controlling the pace of the antitrust review wherever possible.

Creating Time: Be Specific in the Agreement. Because the antitrust review of any large, strategic transaction will take significant time—months, or even years—parties have increasingly tried to account for this by allowing additional time for the antitrust review, setting an outside date that is very far into the future (18 months or more). Take the Disney/Fox transaction announced in December 2017, which will combine Walt Disney Co. and various 21st Century Fox assets, including its film and television studios. There, the parties agreed to an outside date of December 13, 2018, one year from the date of the agreement, but also provided for at least two six-month extensions (which could be triggered by either party) in the event antitrust clearance had not been obtained.³⁵

The Disney/Fox two-year allowance for the antitrust review may be extremely long, but it nevertheless seems warranted based on outcomes summarized above. However, because the parties cannot predict the pace of the antitrust review, litigation, or any appeals, any outside date that is based on a period of days—even if it is two years out as in Disney/Fox—could be insufficient to ensure there is a regulatory outcome before one party can unilaterally terminate the agreement. After all, Aetna/Humana and Anthem/Cigna were approaching a two-year review period at the time those deals were terminated. And in at least some of the abandoned transactions summarized above, there is a reasonable inference that at least one of the parties found the fixed outside date inadequate when their deal partner managed to slip away.³⁶

A more certain way to achieve a regulatory outcome (good or bad) before one party can unilaterally terminate the agreement is to be explicit in the transaction agreement and agree (stipulate) that a party cannot terminate if there is a pending regulatory proceeding, such as a DOJ and FTC investigation or merger challenge. (This assumes of course that the parties are also contractually agreeing to litigate, if it comes to that.) This solution would contractually guarantee that the transaction could not be terminated before the regulatory review has run its course. A major obstacle to this approach is that parties cannot always predict incentives 18 to 24 months into the future. By negotiating a timing provision that leaves the agreement open until a certain future event, a party is also committing itself not to terminate, even in a circumstance where the party may wish to do so, possibly 18 months into the future when a government merger challenge is pending.

The failed transactions summarized above are prime examples of this difficulty. The market forces and valuations that led the parties to enter the agreement may or likely will change over time, and it is important for deal certainty for parties to assess each other's interests and, where there is alignment, to be as specific as possible in the contract about both parties' obligations. For any number of reasons, it may not be possible for parties to contractually commit to leave an agreement open for an uncertain period of time until there is a resolution in the antitrust review. In particular for the target or acquired party, it seems unlikely that they would agree to an open-ended transaction agreement given risks to the business (and customer base) from a protracted regulatory review of uncertain duration. Either way, it is important for parties to have an understanding on this timing issue from the outset, so that when a specific outside date is agreed, the

³⁵ Twenty-First Century Fox and The Walt Disney Company, Form 8-K, Exhibit 2.1, Agreement and Plan of Merger Among Twenty-First Century Fox, The Walt Disney Company, TWC Merger Enters. 2 Corp., and TWC Merger Enters. 1, LLC (Dec. 13, 2017).

³⁶ There is little data on which party is more likely to walk away from a deal, largely because the parties rarely publicize that information. In the deals described above though, the acquired party walked away in two of them (GE and Cigna), and it is likely that Baker Hughes is a third. None of the acquiring parties opted to terminate the deal. This discrepancy makes sense given the prospect of breakup fees and the enormous resources acquiring companies invest to win approval from antitrust regulators.

parties can still work proactively to manage the timing of the antitrust review to get a regulatory outcome within the contractually agreed outside date (whether it involves litigation or not).

Leaving Time: Control the Clock. Although the parties have limited, if any, control over the length of a merger trial,³⁷ they can to some extent control the timing of the investigation leading up to any challenge—i.e., the period between signing of the transaction and a decision by the reviewing agency to file a complaint. A key element of this control is close coordination with each other and with the DOJ and FTC where necessary to encourage swift resolution of issues. Indeed, in his recent speech on the merger review process, AAG Delrahim encouraged early meetings with Staff and early provision of data and information in response to voluntary DOJ requests as a means of expediting the antitrust review.³⁸ This is very good advice, particularly in harder cases raising difficult issues—the parties will not hide those issues from the agencies, so it is best to engage on them early.

Accelerate the second request process. The DOJ and FTC “second request” investigatory process, where the agencies collect tremendous amounts of data, documents, and information about the transaction, is very burdensome and time-consuming. It is not unusual for the response to a second request to take four to six months, or even longer. However, the data and information required by a second request is fairly standard and predictable. While a lengthy timeframe to respond was perhaps understandable 15 years ago, at the dawn of e-discovery, today parties and their antitrust counsel should be able to respond to second requests much more quickly. Consistent with this, parties can and should agree in the transaction agreement to a specific time period in which they must comply with any second request (e.g., comply with any second request within two months).

As a practical matter the parties may not have real recourse in the event of delay, but having an agreed date will help focus the parties’ legal teams on providing the agencies with the information they need as quickly as possible. The downside to this strategy—as the DOJ and FTC are quick to point out—is that it may “jam” them, because the Hart-Scott-Rodino Act (HSR Act) governing the agencies’ statutory review periods provides that the DOJ and FTC must reach a decision on whether to challenge a transaction within 30 days of substantial compliance with any second request. This concern—assuming it is valid—can be managed, for example, with a “timing agreement”³⁹ that gives the agency additional time (but not too much time) to review the transaction.

Limit timing agreements. The biggest factor in the increasing length of antitrust reviews may be the DOJ’s and FTC’s now pervasive reliance on so-called timing agreements. In a timing agreement, the merging parties agree, possibly in exchange for relief during the second request process, to give the reviewing agency additional time to investigate the transaction after the statutory 30 days (after substantial compliance) provided by the HSR Act. To create leverage, the DOJ and FTC may take a hardline stance on what information or data must be provided in response to the second request or how many custodians’ documents must be searched to com-

³⁷ While the average time for trial has been around 145 days since 2011, that figure has varied significantly from year to year, and even within the same year. For instance, in 2011, the district court issued its decision on the Phoebe Putney/Palmyra Park Hospital merger 71 days after the FTC initially filed its complaint. The DOJ’s challenge of the H&R Block/TaxACT merger that same year, however, took 162 days before there was a decision on the merits. More recently, in 2016, the amount of time to a decision varied between 154 days and 186 days.

³⁸ See *supra* note 1.

³⁹ A “timing agreement” is an agreement between the merging companies and a government agency that provides an agreed upon framework for the timing of certain steps in the investigation, including, most importantly, when the parties are permitted to close the transaction.

ply with the second request. If they will only have 30 days after substantial compliance to decide whether to clear or challenge a deal, the DOJ and FTC have the incentive to make second request compliance as time-consuming as possible, as that will provide more time to review a transaction.

To resolve this tension, a timing agreement may provide that the parties will not close the transaction for an additional 30-60 days after the statutory 30-day review period following substantial compliance, so the DOJ and FTC would have 60-90 days instead of 30 to complete the investigation. Indeed, this is precisely the approach the FTC outlined in its Model Timing Agreement,⁴⁰ and the DOJ has said it will aim to make a decision within 60 days following substantial compliance with a second request.⁴¹

In exchange for a timing agreement, the DOJ and FTC may provide some relief on the volume of information required or the number of custodians whose documents must be searched. Any number of permutations are possible, but by construction (and indeed, it is their main purpose, from a DOJ and FTC perspective) timing agreements delay the antitrust review. Although there are no publicly available data on the duration of timing agreements in lengthy reviews of strategic transactions, timing agreements are now commonplace, and likely a significant cause of delay.

Notwithstanding the FTC's and DOJ's model timing agreement, which may suggest otherwise, timing agreements are not required, and while there may be, in appropriate cases, good reason to give the agencies additional time for review after compliance with a second request, the parties, not the agencies, should control that timing. Parties should proactively manage any extensions of time given to the reviewing agency. As a specific example, instead of offering blanket extensions of time—e.g., agreeing not to close a transaction for an additional 30 days (or even 60 or 90 days, as sometimes happens)—the parties should tether these extensions to specific investigative milestones to avoid being “strung along,” finding themselves five months post-compliance with no meaningful progress on the issues.

Merging parties should also consider relying on “rolling” notice provisions, for example, where the parties commit that they will give at least 30 days’ notice before closing the transaction, as the only limit on timing to close the transaction. The parties can give the notice at any time, putting the agency on a precise deadline.⁴² Again, other permutations are possible, with the main goal of tying any lengthening of an investigation to real progress in narrowing the issues.

Conclusion

The question then arises: “How much time do I need? Where does this leave us?” Based on recent outcomes analyzed above, the data suggest that parties to major strategic transactions (those raising “knotty problems”) should leave at least a year for the agency's review (before any challenge), and up to 18 to 24 months to litigate to a decision. This seems extreme, and it is extreme by historical standards—for example the Whole Foods/Wild Oats merger in 2007 went from

Parties should pro-actively manage any extensions of time given to the reviewing agency.

⁴⁰ Bruce Hoffman, Dir., Bureau of Competition, Fed. Trade Comm'n, *Timing Is Everything: The Model Timing Agreement* (Aug. 7, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement>. See also FTC Bureau of Competition, *FTA Model TA (Public Version)* (Aug. 22, 2018), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_8-22-18.pdf.

⁴¹ See *supra* note 1.

⁴² The FTC Bureau of Competition's Model Timing Agreement includes rolling notice provisions as part of the broader timing elements that affect when parties can close, but the suggestion here is to *only* rely on the rolling notice provision, without any other promise not to close for, e.g., 90 days after substantial compliance.

announcement to decision in the district court in about six months, although the subsequent appeal decision from the D.C. Circuit added 11 months.

Complying with a second request in a major strategic transaction will take time, and it may be in the parties' interest to give the DOJ and FTC additional time on top of that to assess the transaction. In practice, to avoid being left at the altar, parties should be as specific as possible in the transaction agreement, and then actively manage the antitrust review to ensure there is sufficient time to get clearance or, in a worst case, fight through the end of litigation. The strongest protection would be a specific provision that allows unilateral termination only after a specified regulatory outcome (decision to challenge, preliminary injunction in district court, etc.). The parties to a transaction may not be able to agree to that up front, but they will at least know that fact and can plan ahead, working backwards from whatever outside date is agreed upon, to ensure there is sufficient time to resolve the antitrust issues and, if necessary, litigate.

Every transaction is different, but parties that manage the clock, hold themselves and the DOJ and FTC to strict timelines, and leave time to litigate any remaining issues, if necessary, will find themselves in a much better position from a deal certainty and overall timing perspective. ●