How FTC Win Charts A Court-1st Merger Litigation Playbook

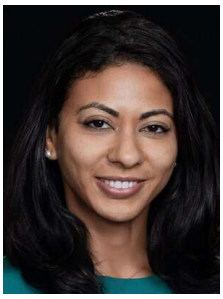
By **Norm Armstrong, Albert Kim and Hanna Ali** (October 7, 2026)



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On Aug. 14, a federal judge issued a permanent injunction blocking Henkel's proposed $725 million acquisition of the Liquid Nails construction adhesives brand from private equity firm American Industrial Partners. The decision marked a decisive trial win for the Federal Trade Commission.

Issued by U.S. District Judge Katherine Polk Failla of the U.S. District Court for the Southern District of New York after a seven-day bench trial, the FTC v. Henkel decision creates a template for how the agency may litigate merger challenges going forward.[1]

On Dec. 11, 2025, the FTC's complaint alleged the deal would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by eliminating head-to-head competition and raising prices for construction adhesives, a product found in nearly every hardware store and home center in the country.[2]

The case was litigated to final judgment entirely in federal district court, without the parallel administrative proceeding the FTC has historically relied on.

That procedural path, and the agency's public framing of the result, may be as consequential for merging parties as the substantive holding — a point FTC Chairman Andrew Ferguson underscored on Feb. 20 at George Mason Law Review's Symposium.

However, at a Sept. 22 fireside conversation in Washington, Ferguson reiterated that although his "strong preference" is to resolve these matters in federal court, the FTC could still pursue a Part 3 administrative case after litigating a merger challenge if parties "make that process difficult" for the agency.[3]

This article discusses the decision and its ramifications.

The Deal and the Market

Henkel sells construction adhesives primarily under the Loctite brand, while Liquid Nails is held by A-Paint Topco Inc., an indirect American Industrial Partners subsidiary that acquired the specialty products business from PPG Industries for $550 million in 2024. On April 15, 2025, Henkel agreed to acquire A-Paint from American Industrial Partners for $725 million.

The court found that construction adhesives, which are used to bond drywall, molding, trim, paneling and subfloors, and sold mainly in cartridges, form a distinct product category from paints, sealants and general adhesives.

The court also found that the relevant product market, as distinct from the professional channel, is limited to construction adhesive cartridges sold through the retail channel — such as Home Depot, Lowe's and Menards home centers, and independent hardware stores

or mass merchants.

That market definition was significant. The court credited the FTC's economist, whose hypothetical monopolist test found that a hypothetical monopolist of retail-channel cartridges could profitably impose price increases of 5% to 10%, and rejected the defense expert's criticisms as unpersuasive.

Henkel and American Industrial Partners pushed hard for a broader market. They argued the FTC's proposed market was simultaneously overinclusive and underinclusive.

They claimed it was overinclusive because it grouped nearly all construction adhesives into one market regardless of chemistry, application, price or quality, when Loctite and Liquid Nails span four different technologies and a wide price spectrum.

Meanwhile, they said it was underinclusive because it excluded the professional distribution channel, which the defense argued left out roughly a third of all U.S. construction adhesive sales.

They also argued that the court's qualitative "practical indicia" analysis under the U.S. Supreme Court's 1962 decision in Brown Shoe Co. v. U.S. could not be used to define a market by customer or sales channel at all, since those indicia go to product characteristics, not to how or to whom a product is sold.

The court rejected each argument, finding that:

- The price and quality differences among construction adhesives were mere gradations along a spectrum of good, better, best — rather than a basis for separate markets;
- Channel-based submarkets are routinely recognized under Brown Shoe and its progeny; and
- The retail and pro channels were not shown to be reasonable substitutes for one another.

An Overwhelming Share Number

The market share and concentration numbers in the court's findings were glaring.

Using retailer point-of-sale data, the FTC's economist calculated that the combined entity would hold an 84% share by dollar sales and a 92% share by volume of retail-channel construction adhesive cartridges, and using wholesale data, the shares were 78% and 90%, respectively.

The resulting Herfindahl-Hirschman Index, or HHI, figures were equally significant — a postmerger HHI of 7,275 with a delta of 3,491 on retail dollar sales. Those numbers were corroborated by third-party research estimating a 71% combined share in 2023, and by Henkel's own internal documents.

The market share statistics were far above the 30% threshold that the Supreme Court identified in its 1963 decision in U.S. v. Philadelphia National Bank as sufficient for presumptive illegality.

The data was so far above this threshold that, per the findings, Henkel's counsel ultimately conceded that the combined share alone would establish a presumption of illegality under the burden-shifting framework of the U.S. District Court for the District of Columbia's 1990 decision in U.S. v. Baker Hughes Inc.

However, the court did not rely on Philadelphia National Bank alone: It cited directly to the 2023 merger guidelines for the proposition that an HHI above 1,800 is "highly concentrated" and a 100-point delta is a "significant increase," and separately invoked the guidelines' hypothetical monopolist test in defining the relevant market, calling the guidelines "persuasive" though not binding on the court.

Beyond Market Share: Head-to-Head Rivals and a Weak Rebuttal

The court found that Loctite and Liquid Nails compete closely across the entire pricing spectrum and are the only two suppliers offering a full suite of multipurpose and project-specific adhesives, each internally identifying the other as its "#1 Competitor."

The two brands also compete directly for shelf space through the product line review process, together accounting for roughly 90% of shelf space at major home centers, the court found.

Henkel and American Industrial Partners argued that low entry barriers and rivals like Gorilla Glue, Titebond, DAP and Sika would discipline any price increase, and that so-called power buyer retailers would prevent Henkel from raising prices.

The court rejected both arguments, finding that brand equity is the single most important driver of sales and a formidable barrier to entry, and that retailers typically pass wholesale cost increases through to consumers while protecting their own margins.

The court further found that, independent of any presumption, the FTC's merger simulation showed likely price increases exceeding 10%, plus lost head-to-head competition and portfolio rationalization.

In a statement announcing the result, FTC Bureau of Competition Director Daniel Guarnera framed the case as a straightforward horizontal competition problem: "Anyone who looked at the construction adhesives shelves of a hardware store or home improvement retailer could see that a merger between Loctite and Liquid Nails would be a bad deal for Americans."

A Deliberate Departure From the Two-Track Model?

In its public statements following the ruling, the FTC has been explicit that it views the case as validating a procedural shift. In an Aug. 17 statement, it described the win as marking "the Commission's new approach to seeking permanent injunctions to block anticompetitive mergers without the need to continue cases in administrative proceedings."

The court noted that nothing in the FTC's organic statute prevents it from seeking permanent injunctive relief in federal court, citing the Supreme Court's 2021 decision in AMG Capital Management LLC v. FTC.

At the Sept. 22 fireside conversation, Ferguson confirmed that the FTC will seek to resolve merger challenges in Article III courts and avoid Part 3 litigation wherever possible, though Ferguson was candid that the shift is not friction-free.

The FTC chairman cautioned that there is procedural roughness to iron out, warning that a company that makes an Article III-only case procedurally difficult could face a subsequent Part 3 proceeding after a preliminary injunction request — even though the FTC would generally drop Part 3 if it lost that request.

As Ferguson put it:

> If companies don't want to participate in ironing out some of the procedural roughness of proceeding exclusively in an Article III court rather than Part 3 and Article III, that's fine. I'll do the two-step dance if that's what you guys want to do. I'm also not going to be nice about it.

Read together with Henkel, Ferguson's remarks clarify that the agency's preference for a single, court-only merits proceeding is genuine but conditioned on parties cooperating with the FTC on the mechanics of litigating exclusively in Article III courts.

Parties that resist those accommodations risk reviving the parallel administrative track this litigation was meant to leave behind — stacked after, rather than alongside, the federal court proceeding.

Why This Matters

For companies contemplating mergers that raise horizontal overlap concerns, the Henkel decision and Ferguson's remarks offer six lessons for dealmakers.

1. Federal court is now the primary battleground. Merging parties should plan for full-blown federal litigation, including a full evidentiary trial, as the main event rather than a preliminary injunction hearing.

2. Cooperation on procedural mechanics is not optional for parties that want to stay out of Part 3 litigation. Ferguson has signaled that parties making an Article III-only proceeding difficult should expect a subsequent Part 3 case, not a more accommodating agency.

3. Market share and concentration statistics retain significant relevance when the market is well supported. A narrowly defined, rigorously tested submarket can produce concentration numbers extreme enough to foreclose a meaningful rebuttal case.

4. Ordinary-course documents calling out a rival as the No. 1 competitor are highly probative and difficult to explain away at trial.

5. So-called power buyer defenses require proof that entry would be timely and sufficient, and that retailer incentives actually align with protecting consumers — not just a list of alternative suppliers.

6. Building materials and other consumer-facing input markets remain an enforcement priority, tied by the FTC to housing affordability and cost-of-living themes.

Looking Ahead

The Henkel decision arrives as Ferguson's FTC continues to recalibrate its enforcement posture, and it will likely be cited in future disputes over where merger challenges should be litigated.

Ferguson ties the shift to shoring up the FTC's and the U.S. Department of Justice's credibility when presenting overlapping merger theories to the same courts, saying: "it's very difficult to make that argument if we are having to present the same arguments to the same judges on the same issues across both agencies."

For now, the message is unambiguous: When the FTC can establish a well-defined market and overwhelming concentration statistics, federal courts are prepared to block the deal outright — and merging parties should expect the agency to press for that forum, while keeping the administrative process in reserve for those who do not cooperate.

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[1] FTC v. Henkel AG & Co. KGaA et al., No. 25 Civ. 10371 (KPF) (S.D.N.Y. Aug. 14, 2026) (redacted findings of fact and conclusions of law).

[2] Client Alert, "FTC Court Win Blocks Henkel's Acquisition of Liquid Nails," (Aug. 21, 2026). https://www.cooley.com/news/insight/2026/2026-08-21-ftc-court-win-blocks-henkels-acquisition-of-liquid-nails.

[3] Flavia Fortes, "FTC could bring administrative cases if firms don't cooperate in court, Ferguson says," MLex (Sept. 22, 2026). https://www.mlex.com/mlex/mergers-acquisitions/articles/2528725.