MERGER ANTITRUST LAW

LAWJ/G-1469-05 Tuesdays and Thursdays, 3:30-4:55 pm
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Welcome again to the course. Links to the required reading and the class notes for the first week of class are embed in this note and also may be found on Canvas and AppliedAntitrust.com. This memorandum gives you my thoughts of how you should approach these materials.

Class 1: Introduction to Merger Antitrust (Unit 0)

The first two classes will consist of a quick overview of merger antitrust substantive law and procedure. An understanding, at least at a high level, of this material will be important as we go through the case studies.

There are two types of reading in this course. *Reading materials* for the most part will be primary source material. *Class notes* are outlines in PowerPoint that cover topical areas in the course. Class notes will often cover more than we will have the time to discuss in class. You are responsible for everything in the class notes whether we cover it is class or not.

Reading materials. The Unit 0 reading materials start with the major substantive provisions of the federal antitrust statutes that regulate mergers and acquisitions (pp. 3-4). If you are used to reading modern statutes, you should find the form of the federal antitrust statutes quite interesting. The antitrust statutes enable one of the economy's most significant types of regulation, yet instead of taking 1000s of pages of text as do many modern statutes the substantive provisions of the antitrust laws take a little more than a page. You might also note that they do not give you a clue about what conduct or transactions are prohibited.

The next group of statutes create the governmental and private causes of action to enforce the federal antitrust laws (pp. 4-6). A cause of action enables the plaintiff to bring its claims for adjudication to a federal court and empowers the court to adjudicate the claims and provide sanctions or relief.

The last of the statutory material is a summary of the Hart-Scott-Rodino Antitrust Improvements Act (pp. 7-8). The HSR Act requires that the parties to large mergers, consolidations, tender offers, private or open-market purchases, asset acquisitions, joint ventures in corporate form, and certain other types of ownership integrations or transfers must (1) file a notification report form with the Antitrust Division of the United States Department of Justice and the Federal Trade Commission prior to closing their transaction, and (2) observe a postnotification waiting period before the transaction can be consummated. The HSR Act also provides a new discovery tool, commonly called a "second request," that allows the reviewing agency to obtain additional documents, data, and interrogatory responses from the merging parties and tolls the running of the waiting period during the time it takes for the parties to supply the requested material. I could ask you to read the text of the Act, but it is long, complicated, and boring. For our purposes, a summary will do just fine.

The last of the reading materials for this class is the FTC's administrative complaint challenging aspects of the Albertson's/Safeway supermarket merger (pp. 9-19). This is a very simple complaint that we will use to illustrate both the substance and the produce of a merger case. It is

followed by a quick note on the Herfindahl-Hirschman Index (HHI), which is an important measure of market concentration in merger antitrust law.

My suggestion is that you read the reading materials front to back. Read Section 7 of the Clayton Act, which is the primary antitrust statute, with some care, and then skim the rest of the statutes. I would read the Albertson's/Safeway complaint once, and then refer back to it as you go through the class notes.

Class notes. Much of the course will center on analyzing the antitrust risk associated with a pending merger or acquisition. Lawyers give advice; clients make decisions. The goal is to get the client into a position to make informed decisions about how to proceed (if at all) in light of the antitrust risk the transaction presents. But a big problem for practitioners, and hence for clients, is how to convey a meaningful sense of the risk to the client. Overall, I find that antitrust lawyers do a terrible job on this.

I find that by far the best way to think about antitrust risk is in three nested buckets: (1) inquiry risk, (2) substantive risk, and (3) remedies risk (slides 4-6). This is a very natural way for business people to think about antirust risk. While I am going to address these risks in the context of a merger, they apply to any situation where antitrust risk of any type is present.

1. *Inquiry risk* is the risk that the merits of the transaction will be seriously examined. Antitrust questions do not materialize out of thin air. Someone has to have the incentive and the institutional means of raising the question. Inquiry risk can be easily analyzed from this perspective.
2. *Substantive risk* is the risk that the transaction violates the antitrust laws. Substantive risk arises if and only if there is an inquiry. Analysis of substantive risk requires an identification of the possible theories of antitrust liability that could apply to the situation and then a dispassionate evaluation of those theories in light of the evidence to which the parties have access (including their own documents) or can develop (notably expert evidence), as well as a judgment about the evidence that the investigating agency may develop from third parties that is not available to the merging parties (at least absent discovery in the course of litigation).
3. *Remedies risk* reflects the consequences of a finding that the transaction violates the antitrust laws. Remedies risk is analyzed in terms of the possible outcomes of a finding of a violation and their associated probabilities of occurrence. This includes the range of possible "fixes" (restructurings) of a transaction to eliminate the violation or otherwise negate the concern and the likelihood of their acceptance by the relevant decisionmaker—the agency or the court—and the associated costs of these restructurings, as well as the possibility that there is no "fix" that would eliminate the antitrust problem.

After a quick introduction to antitrust risk (slides 4-6), we will turn to analyzing substantive antitrust risk (slides 8-33). While inquiry risk is logically prior, you will get a better understanding of inquiry risk if we first examine substantive antitrust risk. When you read these slides, keep these two points in mind:

1. Substantive risk can be defined in one of two ways: (a) the risk that the DOJ or FTC will challenge a deal at the end of a merger review, or (b) the risk that at the end of a litigation the transaction will be found to violate Section 7 of the Clayton Act. For reasons we will discuss, almost all challenged transactions are either settled with a

consent decree or voluntarily terminated. Very few proceed to litigation. Therefore, our initial focus will be on the risk that the investigating agency challenges the transaction.

2. We will draw several important distinctions in the course. The first is between the reasons the agency *decides* to challenge a transaction and the reasons the agency puts forth to *explain* why a challenged transaction is illegal. The process of decision-making can be quite different from the process of explanation.

We will focus in this class on a model that predicts agency prosecutorial decision-making rather than explanation. As a result, you may find our discussion provides a somewhat different perspective of merger antitrust analysis than you saw if you have taken an antitrust survey course. Most of what you see in antitrust courses is how judges and occasionally enforcement officials explain the antitrust decisions they reached; my model looks to predicting what enforcement decisions the agency will make. It turns out that there is a big difference. You may also find it curious that my predictive model makes no reference to market definition, HHIs, diversion ratios, upward pricing pressure or the 2010 DOJ/FTC Horizontal Merger Guidelines. Later, when we study merger antitrust litigation, we will examine these and other more formal concepts as we look at the reasons the agency puts forth to convince a court that the transaction is illegal.

Class 2: Introduction to Merger Antitrust (Unit 0)

On Thursday, we will finish the deck. We will pick up inquiry risk by examining the DOJ/FTC merger review process under the HSR Act (slides 34-42). For reasons we will discuss, state and private merger antitrust challenges are very rare, so the vast bulk of challenges result from DOJ and FTC merger reviews.

Next, we will examine remedies risk. At the end of a DOJ/FTC merger review, there are four possible outcomes:

1. *Close the investigation*. The HSR Act waiting period terminates at the end of the investigation with the agency taking no enforcement action or the investigating agency grants early termination prior to normal expiration. There is not much to say here, so I have no slides on it.

2. *Settle with a consent decree*. This is the typical resolution for a transaction that the investigating agency finds problematic. The merging parties will agree to restructure their transaction—often by divesting the problematic lines of business to a third party—in order to eliminate the agency's concerns that the transaction violates the antitrust laws. This agreement is then entered as a federal court order in DOJ proceedings or as an FTC administrative cease and desist order, which are enforceable by contempt and civil penalties, respectively. See slides 47-59.

3. *Litigation*. If the agency concludes that the transaction violates the antitrust laws and the parties insist on continuing with the transaction without "fixing" the problem with a consent decree, the agency will commence litigation to block the deal if it has not already closed or to obtain remedial relief such as divestiture if the deal has closed. By far the most common case is a preclosing challenge, in which case both the DOJ and the FTC would seek a preliminary injunction in federal district court blocking the deal pending a full adjudication of the merits. For permanent injunctive relief, again to block the transaction, the DOJ would proceed in the same federal district court that conducted the

preliminary injunction proceeding (assuming that the preliminary injunction proceeding and the trial n the merits were not consolidated), while the FTC would proceed in its own administrative trial. (See slides 60-81).

Hopefully, we will finish Unit 0 in the first week, which will allow us to go to the Hertz/Avis Budget/Dollar Thrifty case study at the beginning of Class 3.

If you have any questions or comments, send me an e-mail. See you on Tuesday, August 29.

Dale