MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30-4:55 pm
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Links to the required reading and the class notes may be found on the assignments page of Canvas and on the Merger Antitrust Law page of AppliedAntitrust.com.

Classes 13-14 (October 12 and 17): The Evolution of Merger Antitrust Law (Unit 3)

What would this course be without a little history? History is especially important in antitrust law. The antitrust statutes are intentionally vague in their prohibitions and essentially act as enabling statutes to permit the courts to develop competition law through a common law approach.[1] While the statutory approach seeks to provide comprehensive answers to basic questions, under the common law approach questions are raised and answered narrowly as individual cases are brought to the courts. More comprehensive answers to the basic questions gradually evolve as more cases are decided. By its very nature, the common-law approach assumes that judicial mistakes will be made, or at least that incomplete answers will be given to the more general questions raised by the case. While the common-law approach lacks the certainty of the statutory approach, it permits the law to adapt to new learning without the trauma of refashioning more general rules that afflicts statutory law. The need for a process of incremental change was particularly acute in antitrust at the turn of the century, when there was great pressure to control perceived abuses by business but little understanding of what the government could and ought to do to promote competition and free enterprise. But it remains in full operation today, with the Supreme Court as well as lower courts making incremental (and not so incremental) changes to antitrust law as new learning emerges and with changes in the political value judgments that inform the purpose of antitrust law.

An appreciation of antitrust history is important to understanding where the law is and where it might go in the future. It is particularly important to those who, as a prosecutor on behalf of the government or a private practitioner on behalf of a client, seek to move the law in particular directions though the decisions of the court. The most effective advocacy to courts to change the law is grounded in a story of how the changes are part of a natural historical evolution of antitrust law.

We will start with the statutes. In slides 4 through 15 of the class notes, we explore:

1. The early use of the Sherman Act against mergers.
2. The enactment of the Clayton Act in 1914 (with Section 7 specifically addressing mergers). Also read the original provision and compare it to the current Section 7 (p. 5 of the reading materials). At this point, you should also read the complete current version of

[1] This idea is developed in William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982).

Section 7 (pp. 6-7). You are going to have to read it at some point, and you might as well read it now.

3. The loopholes in the original Section 7 that gutted it as a meaningful statute to regulate mergers.
4. The enactment of the Celler-Kefauver Amendments of 1950 that plugged most of the loopholes and produced a legislative history that was very aggressively negative toward mergers and acquisitions.

After you finish the Celler-Kefauver Amendments (slides 9-10), I suggest that you read the excerpt from *Brown Shoe* in the reading materials (pp. 9-14) to see how the Supreme Court read the 1950 legislative history. This is worth a careful read. The *Brown Shoe* Court operationalized of the hostile attitude toward mergers of the 1950 Congress, which continued into the 1960s, and separately its creation of a presumption of anticompetitive effect in *Philadelphia National Bank,* which the lower courts soon treated a conclusive. Then you can read the rest of the statutory section on the Antitrust Procedural Improvements Act of 1980 and the Hart-Scott-Rodino Act (slides 11-15).

Next, we will to some of the early seminal cases that continue to be important today in merger antitrust law.

1. We will start with an introduction to the common law approach to antitrust law. This is in the required reading (pp. 16-18).
2. The first case we will examine is *du Pont*, a 1957 decision applying the original 1914 version of Clayton Act § 7 but very much influenced by the concerns of the 1950 Congress in passing the Celler-Kefauver Act discussed above in the excerpt from *Brown Shoe*, established the broad applicability of the act to all types of horizontal, vertical and conglomerate mergers and acquisitions (including those in which only a minority interest has been obtained), confirmed the construction of Section 7 to reach anticompetitive transactions in their incipiency without waiting for an anticompetitive effect to mature, determined that the proper time at which to assess the effects of a transaction is at the time of suit and not at the time of the acquisition, and vividly illustrated the impotency of the doctrine of laches in Section 7 cases by ordering divestiture of stock acquired forty years prior to the decision. *Du Pont* created many of the foundations of modern merger antitrust law. *See* Slides 17-20 (pp, 19-26 in the required reading are optional)
3. *Brown Shoe*, the 1962 case that was the Court's first decision to apply the new substantive standard under the 1950 amendments and that remains the single most important merger antitrust case from a developmental perspective, reaffirmed the requirement that an unlawful merger must entail a reasonable probability of some substantial anticompetitive effect in a market (as opposed to a mere lessening of rivalry between previously competing firms) and emphasized the critical nature of market definition in merger antitrust analysis. *See* Slides 21-35 (pp, 27-42 in the required reading are optional)
4. In 1963, *Philadelphia National Bank* created a presumption that entitles the plaintiff, at least in horizontal mergers, to establish the requisite anticompetitive effect for a Section 7 prima facie violation from statistical evidence of the market shares of the merging parties

and changes in the level of concentration the merger would entail in the markets in which the parties operate. *See* Slides 36-48 (pp, 43-61 in the required reading are optional)

5. Over ten years later, in 1974, *General Dynamics* reasserted the rebuttable nature of the *Philadelphia National Bank* presumption, which in the intervening years had rapidly become conclusive, and invited deeper economic analysis of mergers and acquisitions in assessing their legality. The *PNB* presumption, as clarified by *General Dynamics*, remains today the de facto exclusive way of establishing a prima facie Section 7 violation in horizontal mergers. *See* Slide 49 (pp, 62-71 in the required reading are optional)

We will end this section with a few slides on the current state of the law on the *PNB* presumption. (Slides 50-53)

In the third section, we will turn to the mergers guidelines variously issued by the Department of Justice and the Federal Trade Commission. Merger guidelines are (ostensibly) a statement by an enforcement agency of the standards it will apply in evaluating mergers under the antitrust laws and deciding whether to challenge the merger. Technically, merger guidelines have no legal force: they are not promulgated according to any congressional delegation of rule-making power nor are they issued according to the notice and comment procedures of the Administrative Procedure Act. Rather, there are simply statements of policy as to how the enforcement agencies intend to exercise their prosecutorial discretion. The guidelines are intended to inform the public (and, at least in the case of the 1982 guidelines, the Antitrust Division staff) about how they will approach the analysis of a merger. The agencies also would like the guidelines to influence the courts in their analyses of mergers, although the guidelines they are not binding on the courts or even deserving of any deference under *Chevron*. Indeed, the guidelines are not even binding on the enforcement agencies, and the guidelines are explicit that the agencies are free to deviate or even contradict them when challenging a merger in court. *See* Slides 55-56.

We will finish up Class 13 with a quick review of the 1968 and 1982 DOJ Merger Guidelines (slides 58-60). These are included in the reading materials, but they are optional (pp. 73-155). However, you should take a look at the FTC's 1982 Statement Concerning Horizontal Merger Guidelines (pp. 142-155), which the FTC issued to explain why it was refusing to join the DOJ in the issuance of its guidelines and to give some explanation as to how the FTC would approach mergers.

Even though we probably will not make to them, if you want to pace yourself you should read both the class notes and the required reading on the 1992 DOJ/FTC Horizontal Merger Guidelines and the 1997 efficiencies revisions (slides 69-83 and required pp. 157-200). The 1992 Guidelines, which addressed only horizontal mergers and were joined by the FTC, was a significant economic upgrade to the 1982 Guidelines. The 1992 Guidelines largely followed the 1982 Guidelines except that they introduced a critically important new requirement of an explicit explanation of the theory of anticompetitive harm. Under the 1992 Guidelines, it was no longer sufficient to say simply that the structural attributes of a merger triggered the *PNB* presumption; now the agency had to explain with some rigor the mechanism of how the merger would be anticompetitive. The 1992 Guidelines provided two theories of anticompetitive harm to fit to horizontal mergers: (a) unilateral effects, which can produce anticompetitive harm even assuming that all of the other firms in the market act competitively, and (b) coordinated effects, which can produce anticompetitive harm when the mergers increases the incentives and abilities of firms in the market to engage in (nonconspiratorial) oligopolistic interaction. These two

theories continue to dominate horizontal merger analysis today. We will examine them in detail when we get to the judicial case studies, so you only need get a general idea now of how these theories work. Although the 1992 Guidelines have been technically superseded, they remain very influential, so I have included them in full text in the reading materials. Reading both the full text and the slides should give you a good understanding.

In Class 14, we will finish our discussion of the 1992 guidelines and spend the rest of the class on the 2010 DOJ/FTC Horizontal Merger Guidelines (slides 85-102 and required pp. 202-246). The 1992 Guidelines are a complete rewrite of the 1992 Guidelines. The agencies explained the reversions by saying that the 1992 Guidelines no longer reflected how the agencies analyzed mergers and that they were too rigid and missed too many anticompetitive transactions. The first was true enough, although relatively simple changes could have brought the guidelines up to date, and there was essentially no evidence that the application of the 1992 guidelines were missing anticompetitive transactions. My personal view (reflected in the S&S commentary (pp. 247-252) is that the agencies were suffering too many losses in court when the techniques of the 1992 Guidelines were used against agencies. In any event, the 2010 Guidelines rejected the programmatic way of analyzing mergers of the 1982 and 1992 Guidelines—which actually provided a means of determining whether a merger was likely to be challenged—and adopted instead a new, flexible approach to analyzing mergers that gave factors to consider but did not predict outcomes. The 2010 Guidelines also deemphasized the role of market definition in prosecutorial decision-making in favor of the use of more direct evidence of competitive harm, although the agencies are still using market definition and the *PNB* presumption to prove their prima facie cases in litigation. (Significantly, the agencies in litigation also provide a detailed explanation of the theory of anticompetitive harm and supporting evidence as originally required in the 1992 Guidelines.) Again, reading both the full text and the slides should give you a good understanding.

Enjoy the reading! Email me if you have any questions.

Dale