MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30-4:55 pm
Dale Collins
dale.collins@shearman.com

Class 6 (September 13): Merger Antitrust Litigations (Unit 5)

On Thursday, we will start the first of two units on remedies risk. Recall that 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 merger investigation 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 of the relevant decision maker—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.

Recall that there are four possible outcomes of a DOJ/FTC merger antitrust investigation (see slide 4):

(1) The investigating agency closes the transaction without taking enforcement and allows the deal to close unimpeded.

(2) Before or at the end of the investigation, the investigating agency and the merging parties agree to a consent settlement that obligates the merging parties to take some action (typically divest some identified businesses or assets) in order to negate the agency's competition concerns. As a practical matter, this avoids litigation and allows the deal to close subject to the consent settlement commitments. Although the consent agreement will be embodied in a judicial or administrative consent decree (which requires the filing of a complaint, and so technically occurs in the course of litigation), no evidence will be taken, no findings of fact will be made, and the consent decree will explicitly recognize that the merging parties admit no violation of the law. This is by far the most common outcome of a transaction that the agency concludes is problematic. The challenge for the investigating agency is to obtain all of the restructuring relief necessary to eliminate the likely anticompetitive effects of the transaction; the challenge for the merging parties (or, more specifically, the buyer) is to convince the investigating agency to preserve as much of the original deal as it can.

(3) At the end of the investigation, the investigating agency and the merging parties do not settle and the matter proceeds to litigation. Importantly, the DOJ is only a prosecutorial agency: it cannot order relief on its own and rather must obtain preliminary or permanent relief through litigation in federal district court.[1] By contrast, the FTC does have quasi-adjudicative authority to order permanent injunctive relief (called a "cease and desist order") after an administrative trial on the merits. The FTC, however, lacks authority to order preliminary injunctive relief, so if it wants to block the closing of a transaction

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[1] The DOJ has no authority to seek civil fines for violations of any of the antitrust laws.

pending an administrative adjudication of the merits it must seek and obtain a preliminary injunction from a federal district court.

(4) At the end of the investigation, the investigating agency and the merging parties do not settle and the merging parties find either the likelihood of success at trial too low or the costs of litigation too high to proceed to litigation. In this situation, the merging parties voluntarily will abandon their transaction and extinguish the need for litigation.

On Thursday, we will cover merger antitrust litigation (Unit 5), while next week we will examine settlements (Unit 6). For Thursday, first read the complete set of Unit 5 class notes. I would pay particular attention to the typical litigation paradigms for the DOJ and FTC (slides 11-12), litigation timing (slides 15-16), the contrasts between the DOJ and FTC (slides 17-19), *Winter* test for injunctive relief (slides 02-21), temporary restraining orders (TROs) (slides 22-24), preliminary injunctions (slides 25-34), and permanent injunctions (slide 35). I also have included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (slides 36-43), but there is no need to study them in any detail. Just try to get an idea of the steps in the process and the length of time it typically takes.

Finally, the notes on appeals—both when an appeal can be taken (slides 44-52) and the standard of review on appeal (slides 53-56)—contain details that are fundamental to litigation practice and antitrust counseling. If you already know all this from another course, you can just skim these slides. If this material is new or if you have forgotten the details, the appeal section of the class notes is well worth studying with some care.

In the Unit 5 reading materials, take a look at Section 15 of the Clayton Act and Rule 65 of the Federal Rules of Civil Procedure, both of which are central to DOJ merger antitrust litigation (pp. 4-6). The docket sheet from the DOJ's challenge to Energy Solutions' proposed acquisition of Waste Control Specialists is worth skimming to get an idea of what happens in court when the DOJ challenges a merger. The DOJ press releases in the case will give you some background on the complaint and how the case ended (pp. 7-26).

Also, take a close look at Section 13(b) of the FTC Act (pp. 28-29), which governs FTC actions for preliminary injunctions in federal district court, and the excerpts from the preliminary injunction briefs in the Ardagh/St. Gobain case (pp. 30-45). As you will see from the class notes, the language in the case law in the District of Columbia appears to provide the FTC with a much more lenient standard for obtaining a preliminary injunction under FTC Act § 13(b) than the DOJ faces under Clayton Act § 15 (which employs a traditional equity standard). The excerpts from the briefs show you how the FTC sought to exploit the difference suggested by this language and the parties sought to minimize it.

The procedural parts of Section 5 of the FTC Act are long and boring, so just skim those to get a high level idea of what they address (pp. 46-52).

There is a very short order in *Arch Coal* on "litigating the fix" (pp. 53-57). The idea here is that if the investigating agency refuses to settlement an investigation on terms the parties are willing to accept and proceeds to litigation, the parties on their own can restructure the deal and the court will then adjudicate the merits of the restructured transaction and not the original transaction on which the challenge was based. The agencies are very opposed to this, but the principle appears to be relatively well established. There remain, of course, questions of how far the parties have to go in the restructuring—do they have to have a signed agreement with a divestiture buyer or is simply a promise to divest enough?— how much advance warning the prosecuting agency must be given of the restructuring, and how much opportunity does the agency have to have to vet the restructuring before a court will adjudicate the restructured transaction.

If you have any questions or comments, send me an e-mail. See you in class.

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