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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Class 18 (October 30): Sysco/U.S. Foods (Unit 11)[1]

On Tuesday, we will turn to the FTC's challenge to the Sysco/U.S. Foods. Quickly review the merger litigation deck (Unit 5 class notes), especially the slides on FTC litigation process (slides 11-12). You will recall that FTC merger challenges proceed simultaneously on two tracks: (1) a preliminary injunction track in federal district court under Section 13(b) of the FTC Act, and (2) an administrative track for trying the case on the merits before an administrative law judge (ALJ). Notwithstanding the two tracks, almost all FTC preclosing challenges are decided in the preliminary injunction proceeding, with the parties voluntarily terminating the deal if the preliminary injunction is granted and the FTC dismissing the administrative complaint if the preliminary injunction is denied.

The standard of a preliminary injunction under Section 13(b) has a different articulation than the standard under Section 15 of the Clayton Act, which applies to challenges brought by the Department of Justice. There is an ongoing debate whether the difference in the articulation means a substantive difference in the standard.

Section 15 invests federal district courts "with jurisdiction to prevent and restrain violations of the Clayton Act in cases brought by the Department of Justice and authorizes the district courts in such cases to "make such temporary restraining order or prohibition as shall be deemed just in the premises." This language authorizes the courts to grant preliminary injunctions. Under Section 15, courts apply the traditional equity standard for preliminary injunctions, namely the showing that (1) the government is likely to succeed on the merits at trial, (2) the balance of equities tips in the government's favor, and (3) the grant of the injunction is in the public interest. In government cases, there is no requirement of showing irreparable injury, and if a likelihood of success on the merits is shown, the public equities of preventing a likely anticompetitive merger will invariably outweigh any private equities of the parties and make the injunction in the public interest (although the courts may give lip service to the requirement).

By contrast, Section 13(b) authorizes federal district courts to issue preliminary injunctions in merger antitrust case brought by the FTC when "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest" (Unit 5 reading materials pp. 28-29). Although courts could have implemented Section 13(b) using the traditional test for preliminary injunctive relief in government cases, perhaps in deference to the FTC's status as an "expert agency" that will (in theory) ultimately decide the merits, the courts have allowed the FTC to meet the statutory requirement of a showing of a likelihood of success on the merits by presenting evidence that "raise[s] questions going to the merits so serious,

[1] A reasonably complete set of the most important filings in the litigation may be found here on AppliedAntitrust.com.

substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[2] Judicial practice in treating the equities is the same in FTC cases as it is in DOJ cases.

The "serious question" articulation has led to a widely held view that the FTC can obtain a preliminary injunction *without* showing a likelihood of success on the merits. You can see an example of this view in the FTC's brief in support of a preliminary injunction in the *Ardagh* case (Unit 5 reading materials pp. 30-38) and well as Ardagh's effort to pull the standard back into the more traditional test (Unit 5 reading materials pp. 39-45).

I have included in the reading the usual introductory materials (pp. 4-43), but given that we are only going to spend one class on the case feel free to skip these altogether. Please read the press release and excerpt from the Form 8-K on Sysco's agreement to sell 11 U.S. Foods distribution centers to the Performance Food Group conditioned on the consummation of the Sysco/U.S. Foods merger (pp. 45-51). This agreement was signed before the HSR waiting period had expired (or at least before the timing agreement had expired) and the FTC filed its petition for a preliminary injunction seventeen days later. Be prepared to discuss your thoughts in class as to why Sysco entered into this agreement.

Read the materials on the litigation (pp. 52-191), focusing on the Memorandum Opinion (pp. 61-218). We will spend the bulk of the class discussing the organization of the opinion and the court's analysis of the evidence and the arguments justifying its entry of a preliminary injunction.

Shortly after the preliminary injunction was entered, the parties terminated the acquisition agreement without taking an appeal and the FTC dismissed its administrative complaint (pp. 193-202). Again, feel free to skip these materials. The Sysco stock chart, however, is worth a glance (p. 203).

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

Dale

[2] FTC v. Warner Commc'ns, 742 F.2d 1156, 1162 (9th Cir. 1984) (collecting citations); *accord* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.); *id*. at 1042 (Tatel, J.); FTC v. H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001); FTC v. Staples, Inc., No. CV 15-2115 (EGS), 2016 WL 2899222, at *6 (D.D.C. May 17, 2016); FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 30 (D.D.C. 2009).