

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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NYU School of Law
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Mondays, 4:10-6:00 pm
FH 316
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Week 14: DOJ/FTC Merger Litigation (Unit 14)

On Tuesday we will finally turn to merger antitrust litigation and settlements, which we did not reach in the last class. This reading guidance simply repeats the Week 13 reading guidance.

Focus on the typical litigation paradigms for the DOJ and FTC (slides 5-6), the contrasts between the DOJ and FTC (slides 10-12), and the standards for temporary restraining orders (TROs), preliminary and permanent injunctions (slides 16-30). I have included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (slides 31-38), 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.

On the front end of the reading, take a look at Section 15 of the Clayton Act and Rule 65 of the Federal Rules of Civil Procedure, which are important in DOJ merger cases (pp. 5-7). Also, take a close look at Rule 13(b) of the FTC Act (pp. 9-10), 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. 11-26). As you will see from the class notes, 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 than the DOJ faces. The excerpts from the briefs show you how the FTC and the parties attempt to deal with the Section 13(b) standard.

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. 27-33).

There is a very short memorandum opinion in *Arch Coal* on “litigating the fix” (pp. 36-39). The idea here is that if the investigating agency refuses to settle 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.

This is likely as far as we will get on Monday. If you want to get ahead of Week 14, take a look at the settlement materials. The reading materials give some basic materials on the settlement process for the DOJ and the FTC (pp. 41-57). If you have the time and interest, please read them. If you have better things to do, you may skip them (but for later in life remember that they exist). Take a quick look at the *Albertsons/Safeway* materials. The complaint is interesting to see how (or how little) detail the FTC pleads in its complaints (pp. 61-71). The FTC’s decision and order embodies the consent order. You may just skim it, but try to get a sense of the various types of provisions it contains. As you look at it, notice what much of the important stuff (to use the technical term) is in the definitions.

If we have time, we will try to put everything together and ask how a buyer and a seller, each knowing that there is likely to be some antitrust intervention in a deal (but perhaps disagreeing on its scope) can allocate antitrust risk in the purchase agreement.

Have a great weekend, Dale