MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 11:10 am – 1:10 pm
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Class 6 (September 14): Merger Antitrust Litigation (Unit 6)

This class explores merger antitrust litigation. There is a lot of material here (as if this would surprise you). If you are pressed for time, I would concentrate on the reading guidance, the class notes, and the case study.

Inquiry risk. After reminding yourself about the possible outcomes of a merger investigation (slide 4), read with some care the slides on the means and incentives to raise challenges (slides 5-7) and plaintiffs and forums (slides 8-15). You should also review the statutes providing rights of action to the DOJ, the FTC, and private parties (which, for this purpose, include the states) (pp. 5-8). The typical litigation paradigms for the DOJ and FTC (slides 16-18) are critical to understanding merger antitrust litigation. Since we will see this material in application when we begin to read case opinions, you can quickly read the slides on litigation timing (slides 19-25)[1] and the contrasts between the DOJ and FTC (slides 26-32). Read the class notes on constitutional challenges to the FTC administrative adjudicative challenges more carefully (slides 33-35)—one of the hottest topics in antitrust today—since we will not be returning to this topic. Then go back to reading quickly the class notes on the types of interim injunctions in merger antitrust litigation (slide 37), the *Winter* test for preliminary injunctive relief (slides 38-39), antitrust preliminary injunctions (slides 40-52), temporary restraining orders (TROs) (slides 53-55), and permanent injunctions (slides 56-57). Rule 65 of the Federal Rules of Civil Procedure applies to all injunctive proceedings in federal district court, and you should at least skim it (pp. 10-11).

There is a vigorous debate on whether the preliminary injunction standard for the FTC under FTC Act § 13(b) is more lenient than the preliminary injunction standard for the DOJ under *Winter*. Read the excerpts from the briefs in the *Ardagh/St. Gobain* case to see how the FTC sought to exploit this difference while the merging parties sought to minimize it (if not eliminate the difference altogether) (pp. 29-44). As a practical matter, however, the debate to date has been largely academic: while judges pay lip service to the different articulations of the standards, at least in the D.C. District Court, where most government merger antitrust cases historically have been brought, the judges understand that deals never survive the entry of a preliminary injunction and so they treat merger antitrust preliminary injunctions under a permanent injunction standard (even though they never say this in the opinion, which would be reversible error).

[1] As we will see in Class 8, the duration of litigation becomes critical in negotiating the acquisition agreement if one of the merging parties wants to preserve the option to litigate. An essential feature of every acquisition agreement is the termination date (often called the "drop-dead date"), after which either party can terminate the agreement unilaterally without cause. If a party wants to preserve a litigation option, the drop-dead date needs to be sufficiently far out to prevent the other party from unilaterally terminating the contract before the litigation ends.

I also have included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (slides 58-70) and a summary of the Biden administration's success to date in court (slides 71-73), but there is no need to study them in any detail.

I thought about including a docket sheet for a fully litigated merger antitrust case so that you could see the types of papers filed in these proceedings. However, I ultimately decided we have killed enough trees with the other materials. But I have created a separate packet in the supplemental materials on the DOJ's challenge to Energy Solutions' proposed acquisition of Waste Control Specialists. It is worth skimming the docket sheet to get an idea of what happens in court when the DOJ challenges a merger.

Arch Coal has a very short order on "litigating the fix" (pp. 14-18). As we saw in the last class, 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 can restructure the deal on their own. The court will then adjudicate the merits of the restructured transaction, not the original transaction on which the challenge was based. Initially, the agencies vigorously resisted this approach, arguing that the court should adjudicate the merits of the original transaction on which the complaint was based. However, the courts rejected this view because the restructured transaction, not the original transaction, would have a competitive effect. The principle now seems well-established in the courts. There remain, of course, questions of how far the merging 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?—and how much advance warning of the restructuring the merging parties must give to the prosecuting agency. There is also the question of how much opportunity the agency should have to vet the restructuring before the court adjudicates the merits. Finally, the question of whether the parties' "fix" is adequate to eliminate the competitive problem, of course, is a subject for litigation.[2]

The notes on appeals—both when an appeal can be taken (slides 74-84) and the standard of review on appeal (slides 85-88)—contain details 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 you have forgotten the details, the appeals section of the class notes is well worth studying with some care. I also have included the relevant statutes and rules in the required reading (pp. 20-27). You should read 28 U.S.C. § 1291 (final decisions of district courts) and 28 U.S.C. § 1292 (interlocutory decisions) carefully. These are important statutes and you should know them. There is no need to study the remaining appellate materials in depth, but you should at least skim them so that you have a general idea of what is in them.

[2] The T-Mobile/Sprint merger provides an example. The DOJ accepted a divestiture consent decree, but fourteen states—led by New York and California—believed the fix to be inadequate and sued to block the transaction. The district court's decision largely analyses the adequacy of the fix. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020). The court rejected the states' challenge, but as time passed it was increasing obvious that the states were correct that the fix was inadequate. *See, e.g.*, Karl Bode, *The Dish 'Fix' for the T-Mobile-Sprint Merger Seems More Shortsighted than Ever*, Wired.com (July 21, 2021); Melody Wang & Fiona Scott Morton, *The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal From the Start*, ProMarket.com (Apr. 23, 2021); Hal Singer, *Beefing Up Merger Enforcement by Banning Merger Remedies*, ProMarket.com (Aug. 5, 2021). The T-Mobile/Sprint consent decree has become the posterchild for those who believe that the federal antitrust agencies should litigate to block deals rather than settle.

Finally, we will spend the second half of the class on the DOJ's challenge to the ABInbev/Grupo Modelo transaction. The ABInbev/Grupo Modelo case study reads like a soap opera. There are a lot of pages here—over 150—but there is no opinion and the materials are very quick to read.

Here are some questions to help focus your reading. We will go through these questions in class, so be prepared!

1. What was the original transaction that ABI was pursuing? (pp. 46-52) Why do you think ABI thought the original transaction would pass antitrust muster (or did ABI think this)?
2. What did ABI do with Constellation Brands before filing its HSR forms in an attempt to allay possible DOJ concerns? Why did ABI do this? (pp. 53-54)
3. What happened between the announcement of the ABI/Modelo (June 29, 2012) and the commencement of the litigation (January 31, 2013)—a period of roughly seven months? (No reading for this)
4. What were the DOJ's concerns about the transaction? What was its formal theory of anticompetitive harm? Why was the fix not enough? (pp. 55-84)
5. Why did Constellation Brands try to intervene in the DOJ litigation? (pp. 85-89—you can skip the reading here and just intuit the answer if you want, although the papers are interesting)
6. What was the revised agreement between ABI and Constellation Brands, and how did it significantly alleviate the DOJ's concerns? (pp. 90-96)
7. Why all of the motions to stay the proceedings? What was going on here? (pp. 97-116)
8. What was the deal that ultimately resolved the DOJ's concerns? (pp. 117-196). All you really need to read, however, is the press release and the DOJ's competitive impact statement.
9. When did the ABI/Modelo and the Constellation deals close? Was the consent decree final at the time? (pp. 200-05)

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

P.S. Since there is more than enough reading here, this class has no homework assignment.