MERGER ANTITRUST LAW

LAW-1469
Georgetown University Law Center
Fall 2024

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 6 (September 12): 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 fundamental 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 40-53), temporary restraining orders (TROs) (slides 54-56), and permanent injunctions (slides 57-58). 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*. The FTC has always taken an aggressive position that it has a lower standard than the DOJ, but in the Biden administration, the FTC is more aggressive than usual. In its brief supporting its Section 13(b) challenge to the IQVIA/PropelMedia merger,[2] for example, the FTC argued that it only needs to show a "fair and tenable chance" of success on the merits to obtain a preliminary injunction pending a decision on the merits in an administrative proceeding.[3] Moreover, the FTC argued that "it is not the role of the court at this stage 'to embark upon a detailed analysis' of the factual record or 'resolve these factual issues on this motion.'"[4] The merging parties vigorously

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[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.

[2] AppliedAntitrust.com collects the most important papers filed in the case (see here).

[3] *See* Plaintiff's Memorandum of Law in Support of its Motion for Preliminary Injunction at 5, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. filed July 18, 2023).

[4] *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law COL ¶ 4, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. filed Dec. 7, 2023; redacted version filed Dec. 18, 2023).

opposed this standard and argued instead that the FTC must show a "likelihood of success" on the merits.[5] The court has a lengthy discussion of the standard in its opinion, but it is not clear (at least to me) what the court decided was the proper operational test.[6]

As a practical matter, however, the debate over Section 13(b) standards to date has been largely academic. While judges pay lip service to the different articulations of the standards, it appears to me that most judges decide merger antitrust preliminary injunctions under a permanent injunction standard (even though they never say this in the opinion, which would be reversible error). I have several reasons for believing this.

1. Courts recognize that, as a practical matter, the preliminary injunction decision will almost surely determine the outcome of the merger. When a preliminary injunction decision is made, the typical transaction will have been pending for 18 to 24 months. If a preliminary injunction is entered, a Commission decision on the Section 7 legality for the merger will not be decided for another 18 to 24 months. A transaction cannot survive in limbo for the 36 to 48 months from the signing of the merger agreement to an administrative decision on the merits, so the parties will abandon their transaction if a preliminary injunction is entered rather than litigate on the merits. Courts recognize this, which encourages them to regard the entry of a preliminary injunction as if it were a permanent injunction.
2. Unlike preliminary injunctions in many matters that are decided on a truncated record with discovery incomplete, the court in both FTC and DOJ merger antitrust cases will make the preliminary injunction decision on what is essentially the full trial record (including expert evidence). The investigating agency will have conducted six or so months of precomplaint discovery during the second request investigation, and the merging parties will devote the resources necessary to conduct three or so years of postcomplaint discovery in six or eight weeks. Indeed, the Justice Department has found the preliminary injunction record sufficiently complete that, for the last 40 years, it has agreed to consolidate the preliminary injunction proceeding and the trial on the merits under Rule 65(a)(2).[7] Likewise, since 1995, the FTC typically will not pursue an administrative trial on the merits if the district court denies the Commission's request for a preliminary injunction, presumably on the expectation that the Commission would not reach a different result on the merits than did the district court in the Section 13(b) proceeding.[8]
3. There is no material difference between FTC Section 13(b) proceedings and DOJ permanent injunction trials in either (a) the time for postcomplaint discovery or (b) the number of live hearing days. Accordingly, there is no practical need for the district court to decide a Section 13(b) request for a preliminary injunction any differently than a request for a permanent injunction.

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[5] *See* Defendants' Memorandum of Law in Opposition to the FTC's Motion for Preliminary Injunction at 11-12, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER (S.D.N.Y. filed Nov. 13, 2023).

[6] *See* Opinion & Order, FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER, at *13-17 (S.D.N.Y. Dec. 29, 2023; public version Jan. 8, 2024).

[7] Fed. R. Civ. P. 65(a)(2). The last case where the Justice Department pursued separate proceedings for the preliminary injunction hearings and the trial on the merits was United States v. Siemens Corp., 490 F. Supp. 1130 (S.D.N.Y.) (denying preliminary injunction relief), *aff'd*, 621 F.2d 499 (2d Cir. 1980).

[8] Admittedly, I have not done an analysis on the FTC's merger antitrust cases to confirm this. But I know of no case since 1995 where the FTC tried the merits in an administrative trial after the district court denied its Section 13(b) request for a preliminary injunction.

4. In deciding whether to grant a Section 13(b) preliminary injunction, modern district courts write extensive opinions with a detailed analysis of the evidence in the preliminary injunction record. Over the last ten years, courts have issued opinions in fourteen Section 13(b) merger antitrust cases (not counting two decisions denying a preliminary injunction that were reversed). The average length of these fourteen opinions was 70 pages in typescript, the vast bulk of which are devoted to the factual analysis.[9] These are not "once over lightly" decisions.
5. Section 13(b) opinions are indistinguishable from opinions issued in Section 7 cases brought by the Department of Justice cases consolidated under Rule 65(a)(2) in their length, analytical depth, and outcomes. Although courts articulate different standards for preliminary injunctions sought by the FTC under Section 13(b) and permanent injunctions sought by the DOJ in consolidated Section 15 proceedings, the findings of fact in each (non-reversed) Section 13(b) case would have produced the same results if the DOJ had brought the action for a permanent injunction and the court had made similar factual findings.[10]

I also have included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (slides 59-71) and a summary of the Biden administration's success to date in court (slides 72-75), 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 had killed enough trees with the other materials. However, 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 any anticompetitive effect would result from the restructured transaction, not the original one. 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

[9] Not to put too fine a point on it, but the two cases that were reversed were unusually short—one a 13-page decision and the other a 26-page decision.

[10] I use "findings of fact" advisedly here. In preliminary injunction proceedings, findings of fact are only for the purpose of assessing whether to enter the injunction and are not binding in the remainder of the proceedings. *See* Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (noting that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits").

question of whether the parties' "fix" is adequate to eliminate the competitive problem, of course, is a subject for litigation.[11]

The notes on appeals—when an appeal can be taken (slides 76-88), the standard of review on appeal (slides 89-92), and orders to preserve the status quo pending appeal (slides 93-95)—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.

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 quick reads.

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. 53-59) 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 alleviate possible DOJ concerns? Why did ABI do this? (pp. 60-61)
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. 62-91)
5. Why did Constellation Brands try to intervene in the DOJ litigation? (pp. 92-96—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. 97-103)
7. Why all of the motions to stay the proceedings? What was going on here? (pp. 104-23)

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[11] 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.

8. What was the deal that ultimately resolved the DOJ's concerns? (pp. 124-204—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. 207-12)

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