MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 17 (October 24): Sysco/U.S. Foods (Unit 11)[1]

On Thursday, we will turn to the FTC's challenge to Sysco/U.S. Foods. Quickly review the merger litigation deck (Unit 6 class notes), especially the slides on the FTC litigation process (Unit 6 slides 17-18, 26-35) and preliminary injunction proceedings generally (Unit 6 slides 36-56).

Pay special attention to preliminary injunction proceedings under Section 13(b) of the FTC Act (Unit 6 slides 46-50). 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), and (2) an administrative track for adjudicating the case on the merits before an administrative law judge (ALJ). Notwithstanding the two tracks, almost all FTC preclosing merger antitrust challenges are decided in the preliminary injunction proceeding. The parties have always voluntarily terminated the deal if the preliminary injunction is granted,[2] and, at least for the last 25 years or so, the FTC has dismissed the administrative complaint if the preliminary injunction is denied (although sometimes the losing party takes an appeal). In particular, the Biden administration has yet to prosecute administratively if it loses a preliminary injunction case.

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

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

[2] The time it would take to reach a final resolution of the merits is too long for the merging parties to hold the deal open. Say it takes eleven months after the parties sign the merger agreement to complete the FTC's investigation. The FTC then files a Section 13(b) complaint in federal district court seeking a preliminary injunction pending the final resolution of the merits in an administrative proceeding, and say the court reaches a decision and enters a blocking preliminary injunction six and a half months later. We are now almost 18 months after the signing. Say simultaneously with the filing of its Section 13(b) complaint, the FTC issues an administrative complaint. Say it takes one year for the administrative law judge (ALJ) to conduct the evidentiary hearing and recommend a decision and another six months for the full Commission to enter an order. We are now two and a half years months after the signing of the merger agreement. Historically, the full Commission almost always finds a violation on the merits of a complaint it has issued, so the merging parties will have to appeal to a federal court of appeals and reverse the Commission's decision to lose their deal. The appeal will take at least six months. So even if the merging parties ultimately succeed on the merits, they will not expect to be able to close their deal until no earlier than three years after the signing of the merger agreement. Moreover, this is a very aggressive FTC timetable—four years after the filing of the complaint would not be surprising. All during this time, the target company's value is declining for reasons we discussed earlier in the course. Given this timing, no deal historically has survived the entry of a preliminary injunction in an FTC proceeding. Instead, the vast majority of deals provide for a "drop dead" date of twelve months with perhaps an extension of another six months to litigate. Eighteen months from signing is usually enough time to litigate a Section 13(b) proceeding for a preliminary injunction in an FTC case or a permanent injunction in a full trial on the merits in a DOJ case.

Department of Justice. There is an ongoing debate about whether the difference in 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 to show irreparable injury, and if a likelihood of success on the merits is shown, courts invariably find that the public equities of preventing a likely anticompetitive merger outweigh any private equities of the parties and make the injunction in the public interest (although the courts may give lip service to the balancing requirement).

By contrast, Section 13(b) authorizes federal district courts to issue preliminary injunctions in merger antitrust cases 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." 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, 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."[3] Judicial practice in treating the equities is the same in FTC cases as 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. Regardless of what judges say in their opinions, behind the scenes they appear to apply the same test to DOJ and FTC merger challenges. Judges also understand that the entry of a preliminary injunction will almost certainly kill the deal. Given this consequence, although judges include the "black letter" standards for preliminary injunctions in their opinions, they silently appear to apply a full merits test when deciding a motion for a preliminary injunction.

Sysco/US Foods introduces targeted buyers and price discrimination, so carefully read Sections 3 and 4.1.4 of the 2010 Horizontal Merger Guidelines (pp. 6-9) and Section 4.3.D.1 of the 2023 Merger Guidelines. Powerful customers are also part of the case, so review Section 8 of the Guidelines (p. 13-14) of the 2010 Horizontal Merger Guidelines. The 2023 Merger Guidelines do not address the ability of powerful customers to protect themselves from anticompetitive harm as a defense in a merger antitrust investigation.

I have included in the reading the usual introductory materials (pp. 16-56), but given that we are only going to spend only one class on the case, feel free to skip these pages altogether. Please

[3] 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).

read the press release and excerpt from the Form 8-K on Sysco's agreement to sell 11 US Foods distribution centers to the Performance Food Group conditioned on the consummation of the Sysco/US Foods merger (pp. 57-63). 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 17 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. 64-203), focusing on the Memorandum Opinion. We will spend the bulk of the class discussing the organization of the opinion, the court's analysis of the evidence, and the arguments justifying its entry into a preliminary injunction. The opinion introduces four concepts that we have not yet discussed: (1) cluster markets in product market definition, (2) targeted customer markets in product market definition, (3) defining geographic markets when suppliers travel to customers, and (4) the auction theory of unilateral effects. The class notes examine each of these concepts. I would read the class notes straight through after you have read the opinion.

Shortly after the court entered the preliminary injunction, the parties terminated their acquisition agreement without taking an appeal. The FTC dismissed its administrative complaint (pp. 205-14). Again, feel free to skip these materials if you are running out of time. The Sysco stock chart, however, is worth a glance (p. 215).

Finally, I have included an excerpt from the *Bertelsmann* case (Penguin Random House/Simon & Schuster) on targeted sellers (pp. 217-26). It is a very worthwhile read.

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