ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 3:30 pm - 5:30 pm
Dale Collins
wdc30@georgetown.edu

Week 13: DOJ/FTC Merger Litigation and Settlements (Unit 7)

In our last day of class, after finishing anything that remains from the premerger review process unit, we will turn to merger antitrust litigation and settlements. Much like last week, the class notes provide an overview of the process. For once, these are relatively short. Focus on the types of parties that can bring antitrust merger litigation (slide 5), the types of injunctions courts may enter (slides 6-7), the typical litigation paradigms for the DOJ and FTC (slides 8-9), litigation timing (slides 10-15), the contrasts between the DOJ and FTC (slides 16-19), and the standards for temporary restraining orders (TROs) and preliminary and permanent injunctions (slides 20-35). I have included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (slides 36-47), but there is no need to study them in any detail.

On the front end of the reading, 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, look closely 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 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. 35-39). 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 do not like this approach, but the principle is now well established at least in the D.C. Circuit, if not in all federal courts. 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 merging parties have to give the prosecuting agency of the restructuring, and how much opportunity does the agency have to vet the restructuring before a court adjudicates the merits of the restructured transaction.

Until recently, the vast bulk of investigations in which the agency finds an antitrust concern were settled with consent decrees and not through litigation. The class notes give an overview of the settlement process (slides 48-64). The reading provides more technical detail on the settlement process for the DOJ and the FTC (pp. 41-57), and if you have the time and interest, please read them. If you have better things to do, you may skip the reading (but not the slides). Take a quick look at the Albertsons/Safeway materials. The complaint is interesting to see how little detail the FTC pleads in its complaints (pp. 59-71). The FTC's decision and order embody 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 how much of the important stuff (to use the technical term) is in the definitions.

I should note that while the antitrust agencies during the later part of the Obama administration and throughout the Trump administration still accepted consent decrees to resolve concerns in most cases, the agencies were growing increasingly requiring ever-higher degrees of confidence that a proposed consent decree would fully resolve the investigating agency's concerns. This skepticism has reached new heights in the Biden administration. While the FTC will still entertain consent decree solutions, the DOJ has not accepted a consent decree since Jonathan Kanter became the assistant attorney general in November 2021. This reluctance to accept consent decrees has significantly strained the agencies' enforcement resources, especially at the DOJ. While it is unlikely that the Biden agencies will reverse course, it remains to be seen whether the agencies in future administrations will continue this reluctance.

As always, send me an email if you have any questions. See you in class.