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 318
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Week 14: Contractual Risk Shifting (Unit 15)

Next week, we will finish mergers with a discussion of how to allocate risk in mergers and acquisitions in the merger agreement. Sellers want to allocate risk to the buyer in order to maximize the probability that the deal will close and they will get their money. As a general rule, buyers will accept antitrust risk to the extent that they can trade that off for a lower purchase price provided that they can still get out of the deal if it goes uneconomic. As the class notes explain, there are a number of provisions in a purchase agreement that can be used to allocate antitrust risk. The first 20 pages of the reading materials supplement the risk allocation slides by giving some examples of actual provisions that have been used in purchase agreements as well as some examples of antitrust reverse termination fees in recent deals. You should at least skim these pages, but there is no need for you to read them in any detail.

The remainder of the required reading consists of a case study of the Sysco/US Foods transaction. This was a $8.2 billion merger involving the number 1 and number 2 foodservice distributors in the country. You will need some background, so the materials include the press release announcing the deal, the Sysco investor presentation on the deal, an excerpt from the Sysco 10-K describing its business and some links to articles on the Internet discussing the antitrust risks presented by the transaction. Since I post the readings on AppliedAntitrust.com, I have not included copies of the articles themselves in the reading material, but please try to take a look at them. I suspect that you can read all of the linked material in less than 10 minutes except for the Hale Group report. That report is only 18 pages, but it is packed with information about the foodservice industry. Try to take a look at it (especially Exhibit 3: The Foodservice Distributor Segmentation Landscape and the graph on the next page). At the end of the readings, I have included a copy of the Sysco/US Foods merger agreement. It is 85 dense pages and I do not suggest that you read it all, much less print it out. I have marked the provisions that are of significance to the allocation of antitrust risk and you can just read those. (The best way to do this is to scroll through the document and look for the yellow highlighting.) I included all the extra pages to give you the context of where the antitrust-related provisions fit into a purchase agreement. Try to connect the slides on risk allocation to the corresponding provisions in the agreement.

IMPORTANT: I encourage you to read and think about the Sysco/US Foods transaction, but we are not going to discuss it in class unless you have questions. (So if you are really pressed with papers and the like you can skip the case study and I will not know it.) Rather, we are going to do another case study in class: the acquisition by Fresenius Medical Care AG of Liberty Dialysis for $2.1 billion. Here is what you need to know before class: The companies operate outpatient dialysis clinics to treat patients suffering from end stage renal disease. Most of these patients, many of whom are very ill, receive dialysis treatments three times a week, in sessions lasting between three and five hours, to remove toxins and excess fluid from their blood. Kidney transplantation is the only alternative treatment to dialysis services, but the wait-time for a replacement kidney can be more than five years, and during that time these patients must be on dialysis. Fresenius, which is headquartered in Bad Homburg, Germany, operates more than 1,800 outpatient dialysis clinics throughout the United States, treats approximately

130,000 patients each year, and earns total revenues of $8 billion. Liberty Dialysis, privately held and headquartered in Mercer Island, Washington, is the third-largest provider of outpatient dialysis services in the country. It operates 260 dialysis centers, providing services to approximately 19,000 patients in 32 states and the District of Columbia.

You job in class will to be to advise Liberty Dialysis. With a very attractive offer of $2.1 billion, Liberty and its owners very much wants to do the deal, but your partners—the corporate lawyers—have advised the company that it needs to talk to you, the firm's antitrust lawyers. Liberty's CEO (played by me), who also has a substantial equity stake in the company and therefore stands to make a lot of money if the deal closes, wants to know what the antitrust risks are in the deal and what, if anything, he can do to reduce them and ensure that Liberty's owners get their money before the company accepts Fresenius' offer. He also will be happy to answer any questions you may have about the company, Fresenius, and the market environment to enable you to give him the advice he needs.

See you Monday.

Dale