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AMERICAN BAR ASSOCIATION

Section of Antitrust Law
321 N. Clark Street
Chicago, Illinois 60610-4714
(312) 988-5550
FAX: (312) 988-5637
E-mail: antitrust@abanet.org
http://www.abanet.org/antitrust

ASSOCIATION YEAR 2005-2006

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1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

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7 Times Square
New York, NY 10036

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SECTION DIRECTOR
Joanne Travis
Chicago, IL
(312) 988-5575
(312) 988-5637
travisj@staff.abanet.org

October 28, 2005

<u>Via Express Mail and E-mail</u>

Antitrust Modernization Commission
Attention: Public Comments
1120 G Street, N.W.
Suite 810
Washington, DC 20005

Re: Comments Regarding Differential Merger Enforcement Standards

Ladies and Gentlemen:

On behalf of the Section of Antitrust Law of the American Bar Association, I am pleased to submit the enclosed comments to the Antitrust Modernization Commission in response its request for public comments relating to Government Enforcement Institutions: Differential Merger Enforcement Standards.

Please note that these views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Donald C. Klawiter

Donald C. Klawiter
Chair, Section of Antitrust Law

Comments of the Section of Antitrust Law
of the American Bar Association
in Response to the
Antitrust Modernization Commission's
Request for Public Comment
Regarding Government Enforcement Institutions:
Differential Merger Enforcement Standards

The Section of Antitrust Law ("Antitrust Section") of the American Bar Association ("ABA") is pleased to submit these comments to the Antitrust Modernization Commission (the "Commission" or "AMC") in response to its request for public comment dated May 19, 2005 regarding specific questions relating to Government Enforcement Institutions: Differential Merger Enforcement Standards, selected for study by the Commission. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

Summary of Comments

These comments address what steps, if any, should be taken to eliminate differences in treatment arising out of which antitrust agency, the Federal Trade Commission ("FTC") or the Antitrust Division of the Department of Justice ("DOJ"), reviews a merger.

The Antitrust Section has identified a number of differences in treatment by the antitrust agencies. In particular, the agencies are (1) subject to a different preliminary injunction ("PI") standard, (2) each has different options and practices in seeking permanent relief, and, (3) as a result, each has a somewhat different standard of review on certain appeals. While the DOJ is subject to the traditional equitable standard applied by federal courts to motions for PI, the FTC proceeds under the more lenient standard set forth in the FTC Act. In seeking permanent relief following success or failure at the PI phase, the FTC has the option of commencing administrative litigation while the DOJ's cases generally end after the federal court rules on the motion for preliminary and/or permanent injunctive relief. Because the FTC can obtain permanent injunctive relief through an administrative proceeding, the appellate review of a permanent injunction ordered by the FTC differs from the review of a permanent injunction ordered by a district court.

These differences, based on the different statutes governing the two agencies and their distinct nature — the FTC is an independent commission while the DOJ is part of the executive branch — are not related to the industries generally reviewed by each of the agencies and, indeed, predate the current merger review process.

The Antitrust Section believes that these differences do not serve any policy purpose as applied to the pre-consummation review of mergers and should, as much as possible, be eliminated. We propose that the Commission consider recommending to amend the FTC Act so that the FTC's motions to enjoin preliminarily a merger or acquisition are subject to the same equitable standard the DOJ must meet. The Antitrust Section also recommends that the Commission take the position that the FTC not pursue administrative litigation immediately following the failure to obtain a PI barring the consummation of a merger or acquisition. The differences in

appellate review standards should be corrected by implementation of the above recommendations.

Comments

The Commission framed the question as follows:

> **"To the extent that dual [FTC and DOJ] [merger] enforcement continues, should steps be taken to eliminate differences in treatment arising out of which agency reviews a merger?"**[1]

Introduction

The query set forth above assumes the existence of "difference in treatment" arising out of whether the FTC or the DOJ undertakes the review of a merger or acquisition. In order to provide comments in response to this query, this memorandum begins by identifying the sources or causes of these differences between the legal standards and procedural options available to each of the antitrust agencies. We next describe and examine three key areas where there are differences in merger review: (1) the standard for obtaining a PI, (2) the different ways each of the agencies seeks permanent relief, in particular, the FTC's ability to bring administrative challenges, and (3) the different standards for appellate review. Following the examination of each of these three areas, we offer proposals to correct or minimize these imbalances.

Sources of Difference in Treatment

The differences in treatment arise primarily from the DOJ's status as a member of the Executive Branch and the FTC's status as an independent administrative agency. None of these differences is specific to merger enforcement or was designed with dual merger enforcement in mind; all of the statutory differences pre-date the Hart-Scott-Rodino Act of 1976, as amended, 15 U.S.C. § 18a. That context suggests that the differences should be examined without any presumption that they are in the best interest of merger enforcement.

The differences cannot be defended by reference to the industries for which each of the DOJ and FTC may have primary responsibility due to the allocation of merger review under the *ad hoc* clearance procedure employed by the agencies.[2] That is, the differences were not de-

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[1] This question was identified in the Memorandum of the AMC Mergers, Acquisitions and Joint Ventures Working Group of December 21, 2004 ("December Memo") and elaborated on in the AMC Mergers Study Group Memorandum of May 5, 2005 ("May Memo"). *See* 70 Fed. Reg. 28,902 (May 19, 2005) (Enforcement Institutions – questions B1-B4).

[2] Under the current *ad hoc* clearance procedure, certain industries are routinely assigned to FTC for merger review while other industries are routinely assigned to the DOJ. *See* Comments of the Section of Antitrust Law of the ABA in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Government Enforcement Institutions: Dual Merger Enforcement. *See generally* FTC, Statement of Commis-

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signed to address the differences that may exist in merger enforcement in particular industries. There are also no differences in the statutory standard (Section 7 of the Clayton Act, 15 U.S.C. § 18) as applied to industries primarily handled by one agency or the other that might argue in favor of the existing procedural differences. It is also worth considering that U.S. efforts to promote sensible antitrust merger enforcement around the world can be hampered by deficiencies in the U.S. system or procedures and processes that cannot be defended in the name of good merger enforcement. It cannot be helpful on the international scene to have to explain an aspect of U.S. merger enforcement by reference to "politics" or "historic accident."

Preliminary Injunction Standards

Question 1: Does the standard the DOJ must meet to obtain a preliminary injunction to block a merger differ, as a practical matter, from that the FTC must meet? Has any such difference affected the outcome of a decision, or might it reasonably be expected to affect the outcome?[3]

One difference in treatment between the DOJ and the FTC is the standard governing judicial review of agency preliminary injunction challenges to mergers. While the DOJ is subject to the traditional PI standard applied by the federal courts, the FTC's PI motions are examined under the more lenient standard set forth in Section 13(b) of the FTC Act.

The DOJ must meet the traditional PI standard in challenging a merger: "a reasonable likelihood of success on the merits" and "the balance of equities" favoring the government.[4] The standard differs slightly depending on the circuit as each circuit has its own articulation of the elements necessary to grant a PI. Some lower courts and the DOJ have articulated a more lenient standard. For example, in *United States v. Country Lake Foods*,[5] the court applied a slightly less demanding test even though it denied the DOJ's motion for a PI. The court held that "a preliminary injunction is not warranted because the balance of factors tips toward the defendants and the Court is not left with questions so serious and difficult as to call for more deliberate investigation."[6] In *United States v. UPM Kymmene, OYJ*,[7] the DOJ advocated that "a plaintiff seeking a

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sioners Orson Swindle and Thomas B. Leary (Jan. 18, 2002), *available at* http://www.ftc.gov/opa/2002/01/ftcdojostl.htm, and other related statements available on the FTC website.

3 May Memo.

4 *See, e.g.*, *United States v. Siemens Corp.*, 621 F.2d 499, 505-06 (2d Cir. 1980) (citations omitted). Although courts generally also require a showing of irreparable injury or substantial harm to the public to grant a preliminary injunction, many courts have held that irreparable harm to the public should be presumed once the government establishes a reasonable probability of success. *See, e.g., id*. at 506.

5 *United States v. Country Lakes Foods*, 754 F. Supp. 669 (D. Minn. 1990).

6 *Id.* at 675 (quoting *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

preliminary injunction need only prove 'some likelihood of prevailing on the merits' along with irreparable harm."[8]

The FTC proceeds under Section 13(b) of the FTC Act: "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond."[9] As a matter of law, the FTC standard is less demanding:[10] courts have found that 13(b) should be read to make injunctive relief "broadly available to the FTC."[11] Courts have also noted that 13(b) "places a lighter burden on the Commission than that imposed … by the traditional equity standard."[12] Courts have found that under Section 13(b), the FTC needs to show only that the merger raises serious enough questions that it must be enjoined so that the FTC can embark on a more thorough investigation.[13] The DOJ must satisfy a much more stringent burden in showing that the merger may substantially lessen competition. The FTC faces a lesser burden because of the FTC's role as an ultimate decision maker.

It is difficult to quantify whether in practice the different legal standards would yield different results, but the possibility that the different standard could be outcome-determinative cannot be defended. In addition, the perception (on one or both sides of the negotiating table) that the FTC has an easier standard to meet may very well affect the relief agreed to in consent decrees.

Question 2: To the extent there is a difference in legal standards, should the different standards be harmonized? If so, how?[14]

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7 *United States v. UPM-Kymmene, OYJ*, 2003-2 Trade Cas. (CCH) ¶ 74,101, 2003 WL 21781902 (N.D. Ill. Jul. 25, 2003).

8 United States Prehearing Statement on the Applicable Law at 1, *available at* http://www.usdoj.gov/atr/cases/f209600/209689.htm. The court adopted the preliminary injunction standard suggested by DOJ. *See UPM-Kymmene*, *OYJ*, 2003-2 Trade Cas. (CCH) ¶ 74,101, 2003 WL 21781902 (quoting *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999)).

9 15 U.S.C. §53(b) (2004).

10 *See* Appendix B.

11 *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 44 (D.D.C. 2002).

12 *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984). *See also United States v. Gillette Co.,* 828 F. Supp. 78, 80 (D.D.C. 1993) (comparing the two standards) (Appendix B includes a more detailed description of the court's discussion).

13 *See Libbey, supra* note 12*; FTC v. H.J. Heinz Co.,* 246 F.3d 708 (D.C. Cir. 2001).

14 May Memo.

The Antitrust Section suggests that the Commission recommend that when the agencies seek a PI against a merger they be subject to the same standard. This could be effected most efficiently by amending Section 13(b) such that it does not apply to mergers and acquisitions challenged under Section 7 of the Clayton Act but leaves the Commission to proceed under common law principles of equity.

Permanent Relief

When seeking permanent relief following the federal court's decision on a motion for a PI, the two agencies' options and practices differ dramatically. When the government obtains a PI against the consummation of a merger, most merging parties abandon the transaction or settle. When the government loses, the FTC has the option to proceed in administrative litigation and from time to time has taken this route. Although the DOJ has the option of seeking permanent relief in federal court after failing to obtain a PI, we have not been able to find any examples of the DOJ having done so. The Antitrust Section believes that the Commission should recommend the elimination of this difference by restricting the FTC from bringing challenges to mergers immediately following a loss in federal court.

A. Mergers challenged by the DOJ are usually decided in one proceeding, either a PI action or a combined preliminary and permanent injunction action.

The AMC Working Group Memo observed that, as a matter of practice, DOJ generally combines a PI action with request for permanent injunction, but is not legally required to.[15]

Although in many circumstances the DOJ has agreed to consolidate its motions for preliminary and permanent injunctions, the DOJ has jealously guarded its right to a separate PI hearing, with its more generous standard.[16] These cases might suggest that the DOJ will only agree to a consolidated hearing when it feels that it is prepared and able to meet the higher burden of a permanent injunction.

We have not found any example where the DOJ has brought an action under Section 7 of the Clayton Act in federal district court seeking a PI and then subsequently sought a permanent injunction. All of the cases we have found fall into one of the following scenarios:

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[15] December Memo.

[16] *See, e.g.*, *UPM-Kymmene, OYJ*, 2003-2 Trade Cas. (CCH) ¶ 74,101, 2003 WL 21781902 (N.D. Ill. Jul. 25, 2003); *United States v. First Data Corp.*, 2004-2 Trade Cas. (CCH) ¶ 74,481, 2004 WL 1946447 (D.D.C. May 25, 2004).

1. A settlement is reached or the deal is abandoned after the United States succeeds in obtaining preliminary relief.[17]

2. The United States decides not to pursue the litigation after losing its preliminary injunction motion.[18]

3. The preliminary and permanent injunction motions are consolidated before, during or after the preliminary injunction hearing pursuant to Fed. R. Civ. Pro. 65(a)(2).[19]

In contrast, as a matter of practice, the FTC generally only seeks a preliminary injunction from a federal court under 13(b). Although Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction," we are not aware of any cases in which Section 13(b) was used to seek a permanent injunction of a merger.

If, as suggested, the Commission supports a change in the standards for a PI so that they are harmonized, the Section suggests no further changes but rather the nature, scope and timing of injunctive relief should remain in the discretion of the enforcement agencies.

B. The FTC has the option of pursuing Administrative Litigation following a district court's decision on a PI action.

Question 3: Should there continue to be a difference in the procedural aspects of federal agency challenges to mergers, specifically that the FTC can commence an administrative proceeding in addition to seeking a court order to block a transaction? If the procedural aspects of agency challenges to mergers should be harmonized, how is that done?[20]

The FTC can commence an administrative proceeding to challenge a merger or acquisition pre- or post- consummation.[21] The DOJ, on the other hand, must bring all of its post-closing

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[17] Press Release, UPM-Kymmene Corp. (July 26, 2003), *available at* http://w3.upm-kymmene.com/upm/internet/cms/upmcms.nsf/$all/85eeaefc06725d57c2256da300468b98?OpenDocument &qm=menu,3,1,0&select=2003.

[18] *See, e.g.*, *United States v. Gillette*, 828 F. Supp. 78 (D.D.C. 1993).

[19] *See, e.g.*, *United States v. Baker Hughes Inc.*, 731 F. Supp. 3 (D.D.C.) (after a full hearing on the government's motion for a preliminary injunction the parties agreed that the record should be treated as completed for purposes of the government's request for a permanent injunction), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990).

[20] May Memo.

[21] *See generally* D. Hoffman and S. Royal, Administrative Litigation at the FTC: Past, Present and Future, 71 ANTITRUST L.J. 319 (2003).

challenges in federal court.[22] As a result, the FTC has, from time to time, continued challenging a merger in an administrative action after having lost in federal court while, as stated above, the DOJ's cases end after such a failure.

The Antitrust Section and other entities have examined the value of administrative litigation to merger enforcement.[23] In a 1989 study,[24] the Antitrust Section identified attributes of non-merger cases ripe for FTC litigation:

1. Conduct arguably subject to the rule of reason or truncated rule of reason;

2. The development and application of uncertain legal theories;

3. Conduct arguably entitled to an antitrust exemption;

4. Industries newly exposed to antitrust laws through deregulation, or in which restraints are arguably justified by the need to further technological innovation or other public purposes;

5. Theories with a firm economic foundation;

6. Industries with which the FTC has developed familiarity;

7. Anticompetitive practices in industries about which there is substantial public concern; and

8. Legal theories grounded in the antitrust laws, rather than an extension – or, at least, an aggressive extension – of the scope of Section 5.

The 1989 study did not specifically focus on the use of administrative merger litigation because at the time of the study the Special Committee observed that FTC merger enforcement was nearly exclusively done through federal court litigation.

In *Arch Coal*, Commissioner Leary dissented from the FTC's decision to seek a preliminary injunction in federal court, preferring instead to challenge the merger in administrative liti-

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[22] For a summary of post-closing merger challenges, see Appendix A.

[23] *See* Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Government Enforcement Institutions: Dual Merger Enforcement.

[24] Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 53 (1989), *available at* http://www.abanet.org/antitrust/comments/ 1989/1989-ftc.pdf.

gation. He wrote that the "administrative arena is the best place to address the challenging issues presented by this case."[25]

The DOJ does not engage in administrative litigation. Therefore, insofar as mergers in certain industries are generally reviewed by DOJ as a result of a clearance allocation between the agencies, these mergers are not subjected to administrative litigation. Whatever the value of administrative litigation to merger enforcement the status quo of effectively subjecting certain industries to it but not others by virtue of the clearance decision between DOJ and FTC cannot be logically defended. The Antitrust Section has previously observed: "As a general rule, which agency handles the review of a transaction should not result in a materially different [litigation] process, at least in the absence of very extraordinary circumstances."[26]

Question 4: What practical burdens are imposed on private parties by the FTC's policy of pursuing permanent relief through an administrative proceeding (in some instances) after failing to obtain a preliminary injunction?[27]

The FTC may pursue administrative litigation even after failing to obtain a preliminary injunction.[28] The FTC pursues an administrative hearing after the denial of a PI if, on a case-by-case basis, administrative litigation would serve the public interest.[29] The *1995 Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of Preliminary Injunction* lists the following five criteria that the FTC should consider when deciding whether administrative litigation serves the public interest:[30]

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[25] Statement of Commissioner Thomas B. Leary, Arch Coal, Inc., File No. 031 0191 (Apr. 7, 2004), *available at* http://www.ftc.gov/os/caselist/0310191/040407learystatement0310191.pdf. *See also* Additional Statement of Commissioner Thomas B. Leary, Arch Coal, Inc., Docket No. 9316, File No. 031 0191 (Jun. 13, 2005) (commenting after his vote to end the investigation that an administrative trial was still originally preferable), *available at* http://www.ftc.gov/os/adjpro/d9316/050613learystatement.pdf.

[26] ABA Antitrust Section, The State of Federal Antitrust Enforcement — 2004 ("2004 Transition Report") at 45, *available at* http://www.abanet.org/antitrust/comments/2004/state_of_fed_enforc.pdf.

[27] May Memo.

[28] The FTC may pursue an administrative hearing after the denial of a request for a preliminary injunction by a federal district court. *See, e.g.*, Arch Coal, Inc., Administrative Complaint, 031-0191(FTC April 7, 2004), *available at* http://www.ftc.gov/os/caselist/0310191/040704cmp0310191.pdf.

[29] Press Release, FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), *available at* http://www.ftc.gov/opa/2005/06/archcoal.htm.

[30] 60 Fed. Reg. 39,741 (1995).

1. The district court's factual findings and conclusions of law;

2. Any new evidence developed during the preliminary injunction proceeding;

3. Whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation;

4. The costs and benefits of further proceedings; and

5. Any additional relevant factor.

Whatever the value of administrative litigation, it is outweighed by the burden on the parties when the FTC has previously sought injunctive relief in court. Parties are forced into a long and costly process because administrative hearings may not begin until after a federal court of appeals reviews the denial of a preliminary injunction.[31] Seeking permanent relief through an administrative proceeding after being denied preliminary relief is generally a futile process because the burden on the FTC is much higher in such a hearing than in a Section 13(b) action.[32] In a speech to the Antitrust Section, former FTC Commissioner Christine Varney advocated that following a denial of preliminary injunctive relief the FTC should infrequently pursue administrative hearings.[33] The Antitrust Section has previously recommended that the FTC consider "changing its policy to be more consistent with the DOJ's process by adopting a strong presumption that the FTC will not institute administrative litigation in merger cases where it fails to secure preliminary relief in federal court, except in extraordinary cases. For instance, in cases where no important doctrinal issue is at stake or where the preliminary injunction proceeding was comprehensive in terms of evidence and arguments developed, a presumption against a Part III proceeding should apply."[34]

The Antitrust Section therefore recommends that the Commission take the position that the FTC not pursue administrative litigation immediately following the loss of a federal court injunction action.[35] Under this proposal the FTC might still pursue administrative merger litiga-

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[31] This is generally the case unless the Commission exercises its discretionary authority under 16 C.F.R. § 3.26(c) by withdrawing the complaint before the final appellate decision.

[32] *See*, *e.g.*, Arch Coal, Inc., Motion to the Commission for Withdrawal of Matter from Adjudication, Docket No. 9316 (FTC Sep. 7, 2004), *available at* http://www.ftc.gov/os/adjpro/d9316/040907respmowithdrawfromadjud.pdf.

[33] Christine A. Varney, Address at the ABA Antitrust Section Summer Meeting (Aug. 7, 1995).

[34] 2004 Transition Report at 45.

[35] As *Arch Coal* demonstrates, the 1995 policy can generate significant uncertainty. The Commission deliberated for six months before concluding not to pursue administrative litigation over a strong dissent by one commissioner.

tion after a not insignificant period of time post-closing. Administrative litigation could be justified after the denial of a preliminary injunction when the passage of time leads to new evidence concerning the anticompetitive effects of a merger. This change would require either the FTC amending its rules of practice or an amendment to the FTC Act.

Appellate Review[36]

Where the DOJ or FTC seeks injunctive relief, appellate review of the district court ruling is subject to the "clearly erroneous" standard for findings of fact and de novo review for legal questions.[37] The FTC's findings of fact following Part III administrative litigation are reviewed by the Court of Appeals under the "substantial evidence" test and some deference is accorded to its conclusions of law as an expert body.[38] This test naturally follows from the administrative process, and thus no change is recommended provided that other changes with regard to the use of administrative merger litigation outlined above are adopted.

Conclusion

The Antitrust Section believes that the Commission should recommend that the different PI standards be harmonized by amending the FTC Act to provide that the FTC's preliminary challenges to mergers are subject to the equitable PI standards developed by the federal courts. The Antitrust Section also believes that the Commission should recommend that the FTC refrain from bringing an administrative action to enjoin permanently consummation of a merger immediately following the failure to obtain preliminary relief in federal court, in order to provide more similar options to both antitrust agencies. The Antitrust Section believes that the difference in appellate review standards, which results from the FTC's ability to bring an administrative action for permanent injunctive relief, will be corrected if the above recommendations are implemented.

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[36] The AMC Working Group raised this issue and then suggested that the AMC not address it. *See* December Memo.

[37] *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *United States v. Baker Hughes, Inc.* 908 F.2d 981 (D.C. Cir. 1990).

[38] *See, e.g.*, *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993).

APPENDIX A

A. DOJ CHALLENGES TO MERGERS OR ACQUISITIONS POST CLOSING

Despite the HSR power to contest mergers or acquisitions before consummation, there are a few examples where the DOJ has challenged a merger or acquisition after the closing of the deal.

1. United States v. Dairy Farmers of America, Inc, 2004 WL 2186215 (E.D. Ky.).

The court considered cross motions for summary judgment addressing whether Dairy Farmers of America, Inc.'s (DFA) formation and partial ownership of Southern Belle LLC violated the Clayton Act. A year after DFA formed Southern Belle, the United States filed a complaint seeking its divestiture from DFA. The DOJ argued that DFA's acquisition of nonvoting capital interest in Southern Belle in combination with its interest in a competing fluid milk processing plant was anticompetitive. The court granted DFA's motion for summary judgment after finding that the government failed to establish a reasonable probability of diminished competition as DFA had no ability to influence business decisions at either of the competing plants.

2. United States v. Syufy Enterprises, 712 F. Supp. 1386 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990).

The government brought this case in district court alleging a violation of Section 7 of the Clayton Act stemming from Syufy Enterprises' acquisition of certain movie theatres in the Las Vegas area. The government sought an injunction that would require Syufy to divest itself of two theatres. The court ruled that the government had not introduced "one shred of evidence" that the acquisition in question posed a substantial likelihood of lessening competition in the relevant product market and therefore found for Syufy on the Clayton Act claim.

3. United States v. Archer-Daniels-Midland Co., 584 F. Supp. 1134 (S.D. Iowa 1984), *rev'd*, 866 F.2d 242 (8th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989), *on remand*, 781 F. Supp. 1400 (S.D. Iowa 1991).

In this case, the government alleged that a long term lease agreement for two corn wet milling plants violated Section 7 of the Clayton Act. There had been no HSR notification and hence no pre-closing challenge to the transaction because the defendant believed that an operating lease did not constitute an acquisition within the meaning of the HSR Act. The district court found that the lease did constitute an acquisition for the purposes of the Act but dismissed the complaint on other grounds. The Eighth Circuit reversed the dismissal. On remand, following a trial, the district court found that the arrangement did not violate the antitrust laws.

4. United States v. Waste Management, Inc., 588 F. Supp. 498 (S.D.N.Y. 1983), *rev'd,* 743 F.2d 976 (2d Cir. 1984).

In 1981, Waste Management, Inc. acquired EMW Ventures, Inc. Both Waste Management and EMW owned subsidiary companies that provided trash collection and disposal services in overlapping areas of both Dallas and Houston. After the acquisition closed, the DOJ argued that this arrangement violated Section 7 of the Clayton Act and sought total divesture of the acquired company. The district court determined that the acquisition did violate the Clayton Act with respect to the Dallas area but not Houston. It then issued an order for divestiture of the subsidiary located in Dallas. Ultimately, the Second Circuit reversed the ruling, holding that ease of entry into the waste collection market meant that a 48.8% market share did not accurately reflect future market power.

B. FTC CHALLENGES TO MERGERS OR ACQUISITIONS POST CLOSING

The FTC has also exercised its power to contest mergers and acquisitions after consummation in the post HSR era. The FTC has brought the vast majority of its challenges in administrative proceedings rather than in federal courts. The standard relief sought is usually a combination of divestiture coupled with a requirement of prior approval for subsequent similar transactions. The following are some of the federal cases and administrative actions involving FTC challenges post-closing.

1. Federal Cases

a. FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131 (N.D. Ill. 1988), *aff'd,* 868 F.2d 901 (7th Cir. 1989).

In June 1988, Illinois Cereal Mills, Inc. purchased certain dry corn milling assets of the Lincoln Grain Company from Elders Grain, Inc. The transaction consisted of both a sale of assets for $14 million as well as a lease for other assets coupled with an option to purchase. The FTC sought preliminary relief in federal court pending completion of administrative proceedings. The particular relief that the FTC sought was an injunction ordering rescission of the asset sale or the appointment of a receiver to operate and manage the acquired assets. While the court recognized the FTC's power to seek such relief, it pointed out that courts grant this relief only under certain circumstances. It stated that the standard for granting such relief requires a demonstration that there is substantial likelihood of success on the merits, that the injunctive relief is "the only available means of ensuring the availability of a final remedy," and that the public interest favors such relief. To demonstrate the likelihood of success on the merits, "the Commission must prove not that the merger in question may possibly have an anti-competitive effect, but rather that it will probably have such an effect." The court ultimately granted an injunction ordering rescission, and the Seventh Circuit affirmed. It is worth noting two factors that may have influenced the circuit court's decision here. First, it appears that the defendants intentionally structured the transaction as a sale and lease/purchase option in order to circumvent HSR reporting requirements. Second, it appears that the defendants accelerated the closing date to

prevent the FTC from seeking a temporary restraining order in time to block the transaction.

b. Textron and Avdel, Temporary Restraining Order (D.D.C. Mar. 9, 1989); Initial ALJ Decision, 1991 WL 639965; Consent Order, 117 F.T.C. 597 (1994); FTC press release (Oct. 28, 1993), *available at* http://www.ftc.gov/opa/predawn/F93/textron4.htm).

On February 22, 1989 the FTC sought a temporary restraining order in the district court to prevent Textron Inc. from taking control of the assets or operations of Avdel PLC. Textron had already acquired 90 percent of Avdel's stock at that point. The court granted the restraining order shortly thereafter, and the FTC issued an administrative complaint the following month. The ALJ dismissed the complaint, and the FTC appealed. The case ultimately ended with a consent agreement whereby Textron agreed to grant a license of certain technology, provide certain technical assistance to the licensee, divest certain assets, and refrain from making certain future acquisitions without prior FTC approval.

2. Administrative Actions

The vast majority of FTC challenges to consummated mergers and acquisitions do not occur in federal court, but rather start with a complaint issued to an administrative law judge (ALJ). In fact, commentators have noted an increased frequency of such post-closing challenges in the past few years. Scott A. Sher, Closed But Not Forgotten, 45 SANTA CLARA L. REV. 41, 41 (2004).

a. Chicago Bridge & Iron Co. N.V., Docket No. 9300, 2005 WL 120878 (F.T.C. Jan. 6, 2005), also *available at* http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf, *clarified*, 2005 WL 900559 (F.T.C. 2005)

After the filing of HSR notifications and after the expiration of the waiting period for DOJ or FTC action but during an FTC investigation, Chicago Bridge & Iron acquired certain assets of Pitt Des Moines Inc. on February 7, 2001. On October 25, 2001, the FTC filed a complaint seeking to undo the transaction on the grounds that it breached Section 7 of the Clayton Act and Section 5 of the FTC Act. The ALJ agreed with the staff and ordered Chicago Bridge to divest itself of the purchased assets. The full FTC upheld the finding that the acquisition was unlawful, although it ordered divestiture of a different package of assets.

b. Evanston Northwestern Healthcare Corp., Dkt No. 9315, Consent Decision and Order, 5 Trade Reg. Rep. (CCH) ¶ 15,731 (F.T.C. May 17, 2005), *available at* http://www.ftc.gov/os/adjpro/d9315/050520do.pdf.

In January 2000, Evanston Northwestern Healthcare Corporation merged its Evanston and Glenbrook hospitals with Highland Park Hospital, a subsidiary of Lakeland Health Services, Inc. On February 10, 2004, the FTC issued a com-

plaint alleging that the merger violated the Clayton Act, pointing to subsequent price increases in all three hospitals. Although the parties have settled part of the case, two counts of the complaint are currently pending before an ALJ.

c. Aspen Technologies, Inc., Docket No. 9310 (Dec. 20, 2004). Complaint *available at* http://www.ftc.gov/os/2003/08/aspencmp.pdf.

In May of 2002, software developer Aspen Technologies, Inc. acquired software company Hyprotech in a transaction that was not reportable under the HSR Act. In August 2003, the FTC authorized an administrative complaint alleging violation of the Clayton Act. The FTC sought divestiture of Hyprotech along with other remedial measures to restore competition to the market for engineering simulation software. Aspen eventually agreed to a consent order requiring divestiture of certain Hyprotech assets.

d. MSC Software Corp., Docket No. 9299 (Aug. 14, 2002). Complaint available at http://www.ftc.gov/os/2002/11/mscdo.pdf.

In 1999, MSC Software Corporation acquired Universal Analytics, Inc. and Computerized Structural Analysis and Research Corporation. All three companies produced and sold versions of advanced Nastran software. Neither of MSC's acquisitions triggered an HSR filing. The FTC filed its complaint in 2001 alleging that the acquisitions were anticompetitive. MSC ultimately entered into a consent agreement that required divestiture, allowing termination of certain contracts, and maintaining the interoperability of its software with the other versions for a period of time.

e. Monier Lifetile LLC, 127 F.T.C. 751 (1999).

In August 1997, Boral Ltd. and Redland PLC, a wholly-owned subsidiary of Lafarge S.A., formed a joint venture limited liability corporation named Monier Lifetile LLC. In 1998, the FTC filed a complaint alleging that the formation of the joint venture violated Section 7 of the Clayton Act by lessening the competition between Boral and Redland in the market for concrete roof tile. Contemplated relief included divestiture of certain Monier Lifetile assets and dissolution of the joint venture altogether. This case ended in a consent agreement requiring the divestiture of certain tile manufacturing assets and prior written notification to the FTC regarding the acquiring of any stock, share capital or equity of any company involved in the manufacture of concrete roofing tile.

f. Automatic Data Processing Inc., 124 F.T.C. 456 (1997).

In 1995, Automatic Data Processing, Inc. (ADP) executed an asset purchase agreement to acquire the assets of AutoInfo Inc. Both companies submitted notification of the transaction to both the DOJ and the FTC on December 7, 1994, but the filing was deemed deficient. ADP consummated the deal on April 1, 1995, and submitted a corrected filing in January 1996. The FTC argued in its com-

plaint that had the correct HSR filing been made prior to consummation of the deal, it would have sought an injunction to prevent the acquisition. Faced with an already completed acquisition, the FTC sought to have ADP divest part of the acquired assets. The case was finally resolved when ADP agreed to a consent order requiring it to divest the AutoInfo assets, provide licenses and technical assistance to the buyer, and obtain prior approval for future acquisitions.

g. R.R. Donnelley & Sons Co., 120 F.T.C 36 (1995).

On October 11, 1990 the FTC issued a complaint objecting to printing service provider R.R. Donnelley & Sons Co.'s acquisition of Meredith/Burda Co., L.P. The acquisition had been consummated on September 4, 1990, one month prior to the issuance of the complaint. The ALJ initially agreed with the FTC that the merger was anticompetitive and issued a divestiture order on December 30, 1993. On review the FTC reversed the decision of the ALJ and nullified his divestiture order. It is worth noting that the FTC did not issue this complaint until after consummation of the transaction because the district court had denied its July 1990 motion for a temporary restraining order prior to the consummation.

h. Coca Cola Bottling Company of the Southwest, 118 F.T.C. 452 (1994), *vacated and remanded,* 85 F.3d 1139 (5th Cir. 1996)

In August 1984, Coca Cola Bottling Company of the Southwest purchased franchises to bottle and sell Dr. Pepper and Canada Dry in the San Antonio area. The FTC filed its original complaint in July 1988 seeking an order for divestiture of both franchises and prior approval for any acquisitions in the relevant market for the next ten years. The ALJ dismissed the complaint because relevant product and geographic markets were broader than the staff alleged. The FTC overruled on de novo review and required divestiture of the Dr. Pepper franchise but not the Canada Dry franchise. In addition, it mandated that the defendant obtain prior approval of any future acquisitions. The Fifth Circuit vacated and remanded the decision, holding that the Soft Drink InterBrand Competition Act governed the antitrust legality of an exclusive territorial soft drink license previously held by a competing soft drink bottler that was a subsidiary of the licensor. On remand, the complaint was dismissed.

i. Adventist Health System/West, 117 F.T.C. 224 (1994).

The FTC issued its complaint in this case on November 7, 1989 alleging that Adventist Health Systems/West and Ukiah Adventist Hospital had violated Section 7 of the Clayton Act in Adventist's 1988 acquisition of Ukiah Hospital Corporation. The ALJ ruled that the staff failed to prove its case with regard to the relevant geographic areas alleged in the complaint. With the relevant geographic areas being larger than the FTC argued, it could not prove the necessary anticompetitive effects. Accordingly, the ALJ dismissed the lawsuit. The full FTC thereafter affirmed the dismissal.

j. Midcon Corp., 112 F.T.C. 93 (1989).

On September 19, 1985, the FTC issued a complaint challenging Midcon Corp.'s acquisition of United Energy Resources, Inc. as anticompetitive in the market for of natural gas pipeline transportation. Interestingly, Midcon filed an HSR pre-merger notification in August, 1985, but it appears that consummation of the transaction was allowed. The ALJ found that the FTC had failed to prove that the cited regions were relevant geographic markets and therefore dismissed the case. On appeal, the full FTC affirmed the decision.

k. Hospital Corporation of America, 106 F.T.C. 361 (1985), *aff'd,* 807 F.2d 1381 (7th Cir. 1986), *cert. denied,* 481 U.S. 1038 (1987).

On July 30, 1982, the FTC filed this complaint. A year earlier, Hospital Corporation of America (HCA) purchased Hospital Affiliates International, Inc. for cash and HCA stock. The ALJ found that the acquisition violated Section 7 of the Clayton Act. Accordingly, he ordered HCA to divest itself of two hospitals in which it had acquired ownership and required HCA to obtain FTC approval for future acquisitions of hospitals in the geographic area. The FTC affirmed the ALJ's decision in part and reversed in part. The Seventh Circuit then affirmed the FTC's decision. This case is another of the few FTC complaints that did not end in dismissal or a consent agreement.

l. Echlin Manufacturing Co., 105 F.T.C. 410 (1985).

In 1981, the Echlin Manufacturing Company acquired from Borg-Warner Corporation all the assets of Borg's aftermarket automotive operations in exchange for Echlin stock. On July 23, 1981, the FTC issued its complaint challenging the transaction as a violation of the Clayton Act. Prior to the proceedings, Echlin entered into a hold separate agreement with the FTC that allowed consummation of the transaction but required Echlin and Borg to be operated as distinct business entities. The ALJ ultimately determined that there were relatively low barriers to entry and accordingly dismissed the case. The FTC subsequently affirmed the dismissal.

m. Schlumberger, Ltd., 103 F.T.C. 78 (1984).

In 1982, Schlumberger, Ltd. acquired Accutest Corp. in a cash deal and subsequently merged it into one of its subsidiary corporations. On January 28, 1983, the FTC issued a complaint charging that the transaction was in violation of the Clayton Act. Before the issuance of an initial order, Schlumberger divested Accutest and the FTC dismissed the complaint, citing changed circumstances.

n. Champion Spark Plug Co. 103 F.T.C 546 (1984).

In 1978, Champion Spark Plug Company acquired all of the stock of The Anderson Company. On July 29, 1980, the FTC issued a complaint alleging that the ac-

quisition was anticompetitive in the market for the manufacture and sale of windshield wiper products in the United States. The ALJ determined that low barriers to entry and a trend away from concentration in the market countered the anticompetitive theory. Accordingly, the FTC dismissed the case.

APPENDIX B

A. DOJ PRELIMINARY INJUNCTION STANDARD

The standard applied in merger cases enforced by the DOJ depends upon the circuit, but the general contours are similar and are laid out in *U.S. v. Gillette Co.*, 828 F. Supp. 78 (D.D.C. 1993). In *Gillette*, the DOJ brought a motion for a PI to prevent the defendants, two premium fountain pen manufacturers, from merging. *Id*. at 79. In articulating the PI standard, the district court recognized the different standard to be used when the suit is brought by DOJ as opposed to by the FTC:

> Often in Clayton Act cases, the suit is brought by the Federal Trade Commission (FTC) pursuant to 15 U.S.C. § 53(b). In those cases, the standard for a preliminary injunction is the statutory "public interest" test: whether "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest (citations omitted). This case, however, is not brought pursuant to § 53(b) and therefore the court must apply this circuit's fundamental four-part preliminary injunction standard.

Id. at 80.

The four-part test requires that the court balance

1. the likelihood of the plaintiff's success on the merits;

2. the threat of irreparable injury to the plaintiff in the absence of an injunction;

3. the possibility of substantial harm to other interested parties from a grant of injunctive relief; and

4. the interests of the public.

Id. To establish a likelihood of success on the merits, the plaintiff must effectively meet two criteria: (1) it must demonstrate that a proposed merger will affect a "line of commerce," and (2) it must demonstrate that the merger may substantially lessen competition. *Id*. at 80-81. The plaintiff need not show that there is a certainty that the merger will create anticompetitive effects; merely that it is probable. *Id*. at 85.

B. FTC STANDARD FOR PRELIMINARY INJUNCTION

The FTC faces a lesser standard. Section 13(b) of the FTCA, 15 U.S.C. 53(b), provides that "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary retraining order or a preliminary injunction may be granted without bond." The court in *F.T.C. v. Libbey, Inc.* noted that "[t]his standard is broader than the traditional equity standard that is normally applicable to requests for injunctive relief and is consistent with Congress' intention 'that injunctive relief be broadly available to the FTC.'" 211 F. Supp. 2d 34, 44 (D.D.C. 2002) (granting FTC's motion for PI). *See also FTC v. Warner Communications Inc.*,

742 F.2d 1156, 1159 (9th Cir. 1984) (Section 13(b) "places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm to obtain a preliminary injunction") (reversing denial of PI).

The court's task is not to make a final determination on whether the proposed merger violates Clayton Act § 7, but rather to make "only a preliminary assessment of the merger's impact on competition." *Id*. at 1162. Determining whether the antitrust laws have been or are about to be violated is an adjudicatory function that is vested in the FTC; the "only purpose of a proceeding under § 13(b) is to preserve the status quo until FTC can perform its function." *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976) (granting injunction).

In deciding whether to grant the FTC's motion for preliminary injunctive relief, the court must determine (1) the Commission's likelihood of success on the merits and (2) whether a balancing of the equities weighs in favor of granting the injunctive relief. *Warner Communications*, 742 F.2d at 1159. Finding that the statute was "rather empty without specification of how the evaluation of the equities and the evaluation of the merits … are to be combined," the court in *FTC v. Elders Grain, Inc.* held that a "sliding scale" approach was appropriate. 868 F.2d 901, 903 (7th Cir. 1991) (affirming district court's denial of injunction). The greater the FTC's likelihood of success on the merits, the less harm from denial of the PI the FTC need show in relation to the harm that the defendant will suffer if the injunctive relief is granted. *Id*.

1. Likelihood of Success

The FTC satisfies this burden by "rais[ing] 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." *Libbey*, 211 F. Supp. 2d at 44 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001)). The FTC need not prove that the proposed merger will in fact violate Section 7 of the Clayton Act, merely a "reasonable probability that the proposed transaction would substantially lessen competition in the future." *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) (citing *Warner Communications*, 742 F.2d at 1160, and holding that FTC is entitled to PI). In *Libbey*, the court seems to have accepted an even lower standard than reasonable probability, finding that the FTC's concerns were "*plausible* and therefore sufficient to establish (the FTC's) prima facie case that the acquisition may have an anti-competitive effect on the market." 211 F. Supp. 2d at 50 (emphasis added).

Efforts by the FTC to articulate a lower standard than "reasonable probability" were met with resistance by some courts. In *FTC v. National Tea Co.*, the court rejected the FTC's argument that it need only show a "fair or tenable chance of ultimate success on the merits" in order to qualify for a PI. 603 F.2d 694, 698 (8th Cir. 1979), *see also FTC v. Freeman Hospital*, 69 F.3d 260, 267 (8th Cir. 1995) (affirming district court decision that FTC had not established likelihood of success on the merits nor balance of the equities favoring injunction). The court in *Freeman Hospital* found that "[s]uch a standard runs contrary to congressional intent and reduces the judicial function to a mere 'rubber stamp' of the FTC's decision." 69 F.3d at 267. "Because Congress expected courts to use independent judgment in reviewing preliminary injunction applications under Section 13(b), we have adopted a more stringent standard." *Id*.

2. Balancing the Equities

In balancing the equities, the court may consider private equities, but public equities "receive far greater weight." *Warner Communications*, 742 F.2d at 1165 (citing *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981)). When the FTC demonstrates a likelihood of success on the merits, "a counter-showing of private equities alone does not justify denial of a preliminary injunction." *Id*. However, in a concurring opinion, Judge Ripple explained that "[w]hen the government's case is weak, the 'public equities' will be less clear. Consequently, in such a case, 'private equities' often will play a more dominant role in the analysis." *Elders Grain*, 868 F.2d at 908. Such was the case in *Freeman Hospital*: "[W]here, as here, the party moving for preliminary injunctive relief has failed to adequately show a likelihood of success on the merits, it faces a particularly heavy burden of demonstrating that the equities nevertheless militate in favor of granting the requested relief." 69 F.3d at 272.