Federal Trade Commission

Changing the Way We Try Merger Cases

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before the

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on Antitrust Litigation:
Strategic & Tactical Considerations in the
Trial of an Antitrust Case

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I was sworn in as a FTC Commissioner at the beginning of 2006. Just before that time the Antitrust Division had lost a number of merger cases that it felt it should have won.[1] Similarly, the Commission had lost a number of merger

cases it thought it should have won.[2] Moreover, the Agencies had not won a single hospital merger case in nearly a decade.[3] Not surprisingly, then, the staffs of both Agencies were somewhat dazed and gun shy about trying merger cases.

As a career trial lawyer, I had faced some of the best plaintiffs' lawyers in the country. For example, they include Mike Khourie in *England v. Chrysler Corp.*,[4] *Jenkins v. Gray Line*, and *Polara Enterprises, Inc. v. United States Golf Association*,[5] a non-merger case; Joe Alioto, Jr. in *Ringsby v. Trucking Employers, Inc.*,[6] who was joined by Dan Shulman in *Reilly v. Hearst Corp.*, a merger case involving the *San Francisco Chronicle* and the *San Francisco Examiner*;[7] and Fred Furth in numerous cartel cases against Continental Can in the 1980s. I figured we at the Commission could learn a lot from them. On the other hand, I had faced a number of plaintiffs' lawyers who weren't so skilled. I think, for example, of the plaintiffs' lawyers in the *Brand Name Prescription Drugs* case, which we tried to a Chicago jury for

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[2] *See* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004); FTC v. H.J. Heinz Co., 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001).

[3] *See* FTC v. Tenet Healthcare Corp., 186 F.3d 1045 (8th Cir. 1999), *rev'g* 17 F. Supp. 2d 937 (E.D. Mo. 1998); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997); FTC v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (unpublished per curiam decision at No. 96-2440, 1997 U.S. App. LEXIS 17422); United States v. Mercy Health Servs., 902 F. Supp. 968 (N.D. Iowa 1995), vacated as moot, 107 F.3d 632 (8th Cir. 1997); FTC v. Freeman Hosp., 911 F. Supp. 1213 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995); FTC v. Univ. Health, Inc., No. CV-191-052, 1991 U.S. Dist. LEXIS 19299 (S.D. Ga. Apr. 11, 1991).

[4] 493 F.2d 269 (9th Cir. 1974).

[5] No. C-78-1320-RHS, 1984 U.S. Dist. LEXIS 21475 (N.D. Cal. Dec. 5, 1984).

[6] 760 F.2d 276 (9th Cir. 1985).

[7] 107 F. Supp. 2d 1192 (N.D. Cal. 2000).

eight weeks in the late 1990s;[8] and of most (not all) of the Justice Department team in the *Oracle* case, which we tried to Judge Walker in 2004.[9] I figured I could learn from their mistakes how *not* to try an antitrust case.[10]

So I tried to rectify things once I joined the Commission as a Commissioner. At first, I ran into some resistance from the staff. I was told, for example, that they'd "outlast" me. Maybe so, but that did not mean they were trying merger cases the right way. And they weren't. They were relying for the most part on customer and competitor testimony to make their cases. That was understandable. That is what they had been taught to do, and old habits die hard.[11]

But that wasn't what I had learned from the A-plus plaintiffs' trial lawyers. In fact, when the lead lawyer for the Antitrust Division in the *Oracle* case told Judge Walker that his

witnesses,[12] I was pretty sure we had that case won because that wasn't how the A-plus lawyers tried their cases. Judge Walker has subsequently confirmed my litigation instincts in his post-mortem discussions of the customer testimony.[13]

I.

The best plaintiffs' lawyers try their cases by describing succinctly but distinctly how the transaction or practice they were challenging was anticompetitive. I call that "describing the story line" of the case.[14] There are numerous advantages to doing that. Most importantly, it focuses the court or jury on something they could understand,[15] instead of on esoteric, econometric formulae that lay judges and juries (including me) are not so likely to comprehend,[16] or on the speculation by third-party witnesses about

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[12] See Oracle Corp., 331 F. Supp. 2d at 1125–33.

[13] See Vaughn R. Walker, Merger Trials: Looking for the Third Dimension, COMPETITION POL'Y INT'L, Spring 2009, at 35, 45 ("Apart from the rehearsed character and monotony of these witnesses' testimony, the most striking feature or image the testimony conveyed was that it was at odds with the basic premise of the government's case.") [hereinafter Merger Trials]; Vaughn R. Walker, Search for a Competition Metric: The Role of Testimony from Customers, Competitors and Economists, 2 COMPETITION L. INT'L 3, 3–5 (2006) (describing several shortcomings of customer testimony, including litigation-inspired perspective, selection bias, and competency issues) [hereinafter Competition Metric]. See also Oracle Corp., 331 F. Supp. 2d at 1131, 1158–59.

[14]

whether the transaction would lead to a small but significant, non-transitory increase in price (SSNIP).[17] Beyond that, if the merger had already been consummated, it means that the trier of fact doesn't have to speculate about what would have happened because it has already happened.[18]

Additionally, the story line approach means that we can more flexibly consider a broad range of effects to be anticompetitive effects. For example, we are used to being told by economists that if pricing is opaque, then we

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an econometric study, no matter how skillful the econometrician is in explaining a study to a lay audience." (citing Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048 (1985))).

[17] *See* Oracle Corp., 331 F. Supp. 2d at 1131 ("Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented. There was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle."); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 145–46 (D.D.C. 2004) ("Furthermore, while the court does not doubt the sincerity of the anxiety expressed by SPRB customers, the substance of the concern articulated by the customers is little more than a truism of economics: a decrease in the number of suppliers may lead to a decrease in the level of competition in the market. Customers do not, of course, have the expertise to state what will happen in the SPRB market, and none have attempted to do so."). *See also* Bates, *supra* note 15, at 286 (pointing out that the fundamental problem with customer testimony is not that the testimony is subjective, or being used to prove anticompetitive effects, but that customers are not competent to testify about something of which they have no personal knowledge—namely, a prediction or projection of the likely effects of a merger that they have never had an occasion (outside of litigation) to make); Walker, *Competition Metric*, *supra* note 13, at 3–4 (explaining that customer testimony about their likely reactions to a post-merger price increase amounts to "unsubstantiated conjecture" because customers are really testifying about their "preferences established in the premerger landscape" rather than what they could do in response to anticompetitive price increase).

[18] *See* Polypore Int'l, Inc., No. 9327, 2010 FTC LEXIS 96, at *9 (Dec. 13, 2010) (Rosch, Comm'r, concurring) ("Evidence about what actually happened following the transaction may, in other words, reduce the need 4(ge)3t the4 k9i8e F. Suh.9581 0 (nu.3(ey wie5 Tw -1.6rde co)3.7)4.1(-1.2(n)7.

cannot consider higher prices to be a coordinated effect of the transaction or practice.[19] For one thing, this isn't even accurate because there are many practices short of price-fixing (as, for example, the allocation of customers or territories) that have the same effect as monitoring and coordinating prices.[20] In any event, economists tend to focus on elevated prices both because neoclassical economics focuses largely on prices,[21] and because prices are more easily measurable than non-price dimensions of competition like quality, variety, and consumer choice.[22] If we analyze the transaction or practice by reference to the transaction's or practice's anticompetitive effects, whatever they may be, we are not so apt to be imprisoned by price theory.

Finally, we can consider both coordi

merger analysis has tended to treat the two as entirely separate theories of liability. [23] A unilateral effects theory more often than not involves proof that the products (or services) of the acquired and acquiring firms are each other's closest substitutes such that a diversion of sales from the B side to the A side is likely to make a post-merger price increase profitable. [24] A coordinated effects theory more often than not involves proof that the transaction is likely to further concentrate an already concentrated market that is vulnerable to coordinated conduct. [25] But, as we have learned from bitter experience, there are cases in which our proof of unilateral effects may be found wanting so that we must rely, in the alternative, on proof of c .0009 Tw [s9 Tw7.

merging parties submit pursuant to the Hart-Scott-Rodino Act,[27] and they are supposed to include all documents authored by, or submitted to, any director or officer of the parties describing any purpose of the transaction or the market in which the parties' goods or services compete.[28]

Second, the story line may be based on the writings of representatives of the parties, including their email,[29] whether or not the writing is sworn or is a 4(c) document.[30] Third, it may be based on the admissions or statements against interest[31] made by a representative of a party during a deposition (we call it an investigational hearing).[32] Again, for those not familiar with an investigational hearing, it is like a deposition except there may be a second Commission attorney present who keeps the deponent on the "straight and narrow" and who, not surprisingly, generally sides with the Commission attorney who is asking the questions.[33] Fourth, the story line may be based on the conduct of the parties such as the payment of a seemingly exorbitant

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[27] 15 U.S.C. § 18a (2011).

[28] 16 C.F.R. § 803.1(a) & pt. 803, App. (item 4(c)) (2012).

[29] *See, e.g.*, *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-00047, 2011 U.S. Dist. LEXIS 33434, at *45–46 (N.D. Ohio Mar. 29, 2011) (concluding from an internal email that "St. Luke's anticipated that the transaction with ProMedica, and its potential for higher prices, would undergo antitrust scrutiny").

[30] *See* PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, ITEM 4(C) TIP SHEET (Apr. 26, 2012) (describing scope of search for responsive 4(c) documents), *available at* http://www.ftc.gov/bc/hsr/4cTipSheet.pdf.

[31] *See* 16 C.F.R. § 3.43(b) (2012) (statements or testimony by a party-opponent are admissible).

[32] *See* 16 C.F.R. § 3.43(e) (2012) (allowing information obtained during investigation to be offered into evidence). *See also* 16 C.F.R. § 2.8 (2012) (setting forth the basic procedure for investigational hearings).

[33] *See* 16 C.F.R. § 2.9 (2012) (setting forth the rights of witnesses in investigational hearings).

amount to make the acquisition, or the payment of a high breakup fee, or the implementation of a "fix" before the transaction that evidences a concern about the antitrust merits of the transaction.[34]

Sometimes, of course, the "story line" just falls out of the sky or out of the mouth of a CEO or Chairman of a party during trial. I once had that happen to me. My chairman witness (unnecessarily) confessed to perjury when he was being cross-examined by Joe Alioto Jr. But that doesn't happen very often, which is why football coaches generally "script" their opening plays ahead of time. Or sometimes, a "story line" gets preempted. The best at that was Mike Khourie. He once told a jury during opening statements that when I got up I'd say "such and such," and a juror nodded disapprovingly. Sure enough, when I gave my opening statement, I said "such and such" almost word for word.

II.

The best plaintiffs' antitrust lawyers are adept at telling the anticompetitive story from the get-go out of the mouths of the Chairman, CEO or Chief Marketing Officer of the parties instead of relying solely on customer or competitor witnesses.[35] The advantages to doing it this way are threefold. To

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[34] MERGER GUIDELINES, supra note 11, § 2.2.1 ("The financial terms of the transaction may also be informative regarding competitive effects."); see, e.g., FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 (D.D.C. 2002) ("The FTC's argument that defendants have in some manner sought to evade FTC and judicial review by proposing the amended agreement is without merit. Rather, the Court construes defendants' position to be that they have attempted to address the concerns expressed by the FTC by amending the proposed merger agreement.").

[35] See Walker, Merger Trials, supra note 13, at 46 & n.58 (recalling that plaintiff's counsel in Reilly v. Hearst Corp. called Timothy White, the publisher of the Examiner, as the first

begin with, it generally prevents these party officers from giving "canned" testimony to justify the transaction.[36] Instead, the trier of fact will hear their story for the first time via cross-examination since they are considered hostile witnesses who can be led.[37] Indeed, Dan Wall, who was lead counsel for Oracle, used to welcome efforts by such a witness to disown the documents that he or she authored because it gave him a chance to flash the witnesses' document up on the screen for all the world to see.[38]

Second, because customer or competitor witnesses (like any third party witness) are not generally considered hostile witnesses, one generally cannot interview them, much less prepare them to testify, ahead of time. It takes an amazing amount of talent (or guts) to put a third-party witness on the stand without knowing what he or she will say. Additionally, it is very difficult to "thread the needle"—that is to say, to assure a trier of fact that a third-party witness is "representative" of all other similarly situated witnesses (like

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witness to talk about he tried to secure San Francisco Mayor Willie Brown's support for Hearst's acquisition of the *Chronicle* with the promise of favorable political coverage; also commenting that "[c]alling a defendant as the first witness is almost always a good idea for plaintiffs").

[36] *See* DAVID BERG, THE TRIAL LAWYER: WHAT IT TAKES TO WIN 246 (2006) ("Being called adverse can put defense witnesses at a huge disadvantage. They don't get a chance to get comfortable on the stand or to warm up the jury, by answering friendly questions from a friendly lawyer. Instead, they get cross-examined immediately about the worst facts in the case.").

[37] *See* 16 C.F.R. § 3.41(c) & (d) (2012). For example, Judge Walker found Mr. White's testimony in *Reilly* to be "explosive and entertaining." Walker, *Merger Trials*, *supra* note 13, at 46.

[38] Indeed, regarding the admissibility of documents generated by the respondents and produced from their own files, there is a Commission rule that puts the burden of proof on the respondents "to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business." 16 C.F.R. § 3.43(d)(3) (2012).

customers),[39] and at the same time not to bore the trier of fact to tears because the testimony is repetitive of other third-party witnesses that have testified. [40]

III.

So as time went on, I and the other Commission members took to asking the staff to describe the "story line" of each antitrust case and to tell us how they would tell the story (that is to say, try the case) before we would vote out a complaint. Then I at least would ask for assurance from the staff that that is indeed how the case would be handled. If it was not, then I might conclude

[39] United States v. Engelhard Corp., 126 F.3d 1302, 1306 (11th Cir. 1997) ("No matter how many customers in each end-use industry the Government may have interviewed, those

that I lacked the requisite “reason to believe” that Section 5 requires in order to vote out a complaint.[41]

It was critically important that the Commission staff “learn how to lose” as well. As a trial lawyer, I knew full well that if you tried cases you were going to lose some of them. I did and even the best plaintiffs’ lawyers did. Of course, I did not want the staff to get used to losing. But at the same time I realized that if the Commission tried as many cases as I hoped we would (and we have), we were going to lose some of them.[42] I wanted the staff to understand that that just goes with the territory.[43]

Finally, I wanted the staff to understand the importance of publicity during a trial. No trier of fact likes to be taken for granted that either the case is a dead-bang winner or a sure loser. All of the best plaintiffs’ antitrust lawyers understood that. That is why they took care to let the media know at all times what was happening.[44] Dan Wall understood that too. He would

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[41] *See* Dissenting Statement of Comm’r J. Thomas Rosch at 2, Lab. Corp. of Am., No. 9345

stroll out of the *Oracle* trial at the end of each day to “brief” the press on what they had just seen. You have no idea how little even experienced media mavens understand our craft. We have an excellent public relations staff at

testimony) in trying its cases. But they should be “frosting on the cake” instead of the cake itself.