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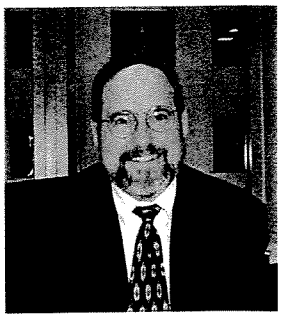

FTC ENFORCEMENT

The Antitrust Rocket Docket at the FTC: Is the FTC Sacrificing Fairness for Speed?

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Administrative litigation before the Federal Trade Commission is fast becoming a mainstay of federal government antitrust enforcement. Surprisingly, FTC administrative litigation was largely abandoned in the late 1990s, but it is being revived because of a series of procedural reforms and the commitment of current FTC enforcers to administrative litigation. Indeed, the FTC administrative process may well become the "antitrust rocket docket," the preferred forum for government antitrust litigation. This article addresses how firms should respond to the increasing challenge of litigation before the FTC's home court.

Like other federal administrative agencies, FTC cases are initially heard by an administrative law judge, whose decision is reviewable by the entire Commission. The Commission is the ultimate finder of fact and law. The Commission's decision can be appealed to any federal court of appeals and ultimately to the Supreme Court, but appellate courts grant the Commission's decision substantial deference.

The utilization of the administrative process has varied over time. Prior to the 1970s all FTC enforcement actions began in administrative litigation. Many of these cases involved relatively inconsequential competitive conduct, and the pace of litigation was very slow. Even important cases might take several years to litigate. In the 1970s, Congress gave the FTC and the Antitrust Division greater powers to challenge mergers and other anticompetitive conduct in federal court.

During the 1980s, when current FTC Chairman Timothy Muris was Director of the Bureau of Competition, there was a tremendous amount of administrative litigation as the Commission focused on anticompetitive conduct especially involving health care and restraints by professional associations. What was important was not the number of cases but the impact of the decisions on antitrust jurisprudence. Cases such as *Ticor Title Insurance* clarified and limited the state action doctrine; *Indiana Federation of Dentists* clarified the antitrust rule of reason and *Superior Court Trial Lawyers* struck down a boycott by a group of court-appointed lawyers. Each of these decisions led to even more important Supreme Court victories establishing important foundations of the law.

During the later 1980s and early 1990s, the Commission's administrative process encountered a barrage of criticism because of its "glacial pace."[1] FTC administrative

[1] The *FTC vs. Occidental Petroleum Corp.* 1986-1 Trade Cas. (CCH) ¶ 67,071, at 62,516 (D.D.C. 1986) ("The reason a grant of a preliminary injunction will spell the doom of an acquisition is apparent. No substantial business transaction could ever survive the glacial pace of an FTC administrative proceeding.")

litigation was far slower and more cumber some than federal court litigation. With few limits on discovery or time restraints, FTC administrative litigation typically lasted between two and four years from complaint to decision. FTC ALJs had little incentive to manage cases and reach timely decisions. Once an ALJ's decision was issued, the Commission itself often took years to issue its decision. The entire process could last up to five years or even longer.

Under the leadership of Chairman Robert Pitofsky in 1996 the Commission implemented a set of reforms to streamline the administrative process. The reforms established shorter deadlines, simplified pretrial discovery, and speeded up the trial itself. The most critical reform was a firm deadline for issuing the ALJ's decision, which, in most cases, must come within 12 months after the Commission issues its complaint. This time limit aims to force the ALJ to manage the litigation and to improve the quality of adjudication by reducing litigation gamesmanship. The ultimate goal is to fulfill the interests of justice by a timely resolution of the case.

During the later 1990s, the administrative litigation process was used but not extensively, probably because the Commission devoted most of its resources to federal court litigation challenging an increasing number of mergers in federal court. There were only two cases fully litigated in the administrative process, probably the smallest number in history.

The Increasing Role of Administrative Litigation

Under the Bush Administration's FTC leadership, administrative litigation has taken a far more prominent role. In just nine months, it has brought three administrative cases, more than any single year of the Clinton Administration. In *The Three Tenors,* the FTC challenges an agreement between Warner and Polygram restricting the marketing of Three Tenors recordings. Two consummated mergers are being challenged as well: MSC Software Corporation's acquisition of two software firms, and Chicago Bridges' acquisition of Pitt-Des Moines' industrial water storage tank assets. Each of these cases is going from complaint to trial in a matter of months.

Three factors suggest that this increase in administrative litigation is only the tip of the iceberg. First, as the merger wave has dissipated, the FTC is shifting more enforcement resources to anticompetitive conduct. In the past nine months, it initiated over 50 nonmerger investigations, again more than any single year of the Clinton Administration. As FTC Chairman Timothy Muris observed: "More recent developments confirm the importance of a strong non-merger agenda. We used to believe that antitrust counseling, at least for major companies, would generally deter anticompetitive conduct. We have learned, however, from *ADM*, the vitamins case, numerous other price-fixing cases, and from *Microsoft*, that the antitrust agencies must aggressively police competitive conduct." This policing will invariably result in administrative litigation, especially where cases involve novel conduct or complex legal or economic issues.

Second, changes in merger reporting thresholds, which have reduced the number of premerger filings by over 80%, will result in more challenges to consummated mergers that were not notified to the agencies. The merger reporting thresholds were increased from $15 million to $50 million, but under the earlier thresholds at least 4-5 mergers a year under $50 million were challenged. In the future, these deals may have to be challenged once consummated in administrative litigation.

Third, an FTC leadership interested in the expeditious resolution of cases now has

good reason to prefer administrative litigation to the federal court system. Few, if any federal courts can adjudicate an antitrust case as promptly as the FTC can under its new rules. Not only do federal courts labor under docket backlogs, but also many federal court judges, as generalists, have a modest familiarity with antitrust cases.

The 1996 Reforms

The most critical aspect of the 1996 reforms was establishing a twelve-month deadline from complaint to ALJ decision. From a practical perspective this means that all discovery and trial must be completed within a ten-month period in order for the ALJ to issue the decision. This fast-track schedule places tremendous burdens on the parties to efficiently manage the litigation, identify issues and resolve procedural disputes quickly. The new rules adopted many aspects of the Federal Rules of Civil Procedures, including changing the standard for good cause for delays in discovery, requiring initial joint disclosures, limiting the number of interrogatories and discovery requests, restricting the introduction of cumulative evidence, and permitting earlier considerations of dispositive motions.

Practical Considerations

What are the practical issues in dealing with the FTC's new fast-track administrative litigation process? These new, compressed time frames for complex cases place tremendous burdens on the parties. The FTC starts with the immense advantage of having conducted a lengthy investigation with practically unlimited powers of discovery. It thus begins litigation with a substantial record, including depositions, documents and affidavits, fine-tuned to the litigation of their case. Moreover, antitrust cases tend to be particularly complex, involving sophisticated economic issues, and often econometric studies and consumer surveys. The FTC's new rules compel respondents to replicate in a few months what the FTC staff takes years to develop. This can present an especially daunting task in merger cases involving cutting-edge economic and econometric issues.

Additionally, much critical information in a case lies in the hands of third parties and competitors, which may act strategically and contest discovery requests, creating additional obstacles for respondents. Finally, truncated time limits often necessitate parties to conduct multiple levels of simultaneous discovery, including simultaneous depositions. Trial preparation is akin to a continuous two-minute drill in football.

What is the practical approach to overcoming these daunting challenges? First, during the investigation stage parties must anticipate the likelihood of administrative litigation. That requires a candid assessment of the strengths and weaknesses of the legal and factual arguments. The investigation stage is critical, because once a complaint has been filed, parties have a limited potential for conducting discovery, identifying critical issues, and developing a factual record.

An aggressive posture early in the investigation is often warranted. The FTC investigative process is particularly one-sided. Its investigations last several months, even years. FTC "investigational hearings" do not offer the same protections as federal court depositions. Respondents have only a limited ability to object, refresh witnesses, or create a balanced investigative record. Respondents are unaware of hearings of third parties and cannot attend them. Investigational hearings are of extremely limited probative value since they do not adhere to the hearsay rule. Yet the transcripts from these hearings typically play a critical role in the FTC staff's case.

This fact calls for very careful preparation of witnesses in administrative hearings and aggressive defense during them. Similarly, where multiple parties are involved, a joint defense agreement with regular communications is essential.

Second, FTC administrative litigation does not necessarily follow all rules of federal court litigation, especially rules of evidence. Counsel must become familiar with the FTC's internal rules and the rules of other administrative agencies, which often will carry weight with an ALJ.

Third, early in the case respondents should seek discovery of all exculpatory material. This should include not only documents but also the identity of all parties interviewed by FTC staff. There is precedent that the FTC staff has a special obligation to disclose exculpatory evidence, analogous to that of a criminal prosecutor. As Judge Hogan observed in *FTC v. Staples,* the FTC staff has "special obligations, even though this is civil litigation, to be full and forthright in their production of documents and their response to discovery."

Fourth, procedural decisions of FTC ALJs are not published. FTC staff, however, has access to these opinions from past cases. This gives FTC staff a significant advantage. FTC ALJs should provide a complete set of their procedural decisions at the outset of litigation so both parties are aware of the relevant precedent on procedural issues.

Fifth, time limits effectively penalize the shotgun approach of trying to hit every possible argument in defense. Such an approach may foster delay in other settings, but will be disfavored in this setting. During the initial stages of litigation parties must assess their best arguments and develop the themes that will be the focus of their litigation. The maxim "less is more" is appropriate and homing in on a few central litigation themes is vital.

Finally, although a case is tried before an ALJ, the ultimate adjudicator is the entire Commission. Thus, parties must be familiar not only with Commission precedent on legal and economic issues, but also with the positions of the specific Commissioners as suggested in their speeches, articles and other decisions. Dissents by Commissioners, even in settlements, can be particularly valuable in determining where the lines of contention exist in the Commission.

Conclusion

The promise of the FTC's 1996 reforms has yet to be achieved. The effort to improve the previous glacial pace of administrative litigation is laudable, especially as such litigation becomes more central to the FTC's enforcement mission. Chairman Muris has echoed these objectives: "We want our non-merger enforcement activities to be 'timely, likely and efficient.'" But speed is not the preeminent goal: justice and fairness are. Respondents are already at a substantial disadvantage. The FTC must scrutinize their rules to determine that its abbreviated schedule does not further disadvantage respondents. ALJs should exercise their power to extend deadlines, postpone trial dates, and require the FTC staff to fully disclose evidence at the start of the case to somewhat correct the imbalance in information. The current setting where respondents have an extraordinarily short time to mount a defense in response to a complaint brought after an exhaustive investigation raises serious questions of fairness. Consumers benefit most from a balanced and fair adjudication, not a rush to judgment.♦