OBSERVATIONS ON FEDERAL ANTITRUST ENFORCEMENT INSTITUTIONS

Comments of William Blumenthal, General Counsel,
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to the Antitrust Modernization Commission
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Thank you for inviting me t

[1] These comments are my own and not necessarily those of the Commission or any particular Commissioner, however the Commission has authorized me to appear today and deliver these remarks.

[2] *See, e.g.*, 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. 43 (1989).

confirmation hearing in 1995. Commenting on dual merger enforcement, he said that "while you might not have set it up that way

[4] *Nomination of Robert Pitofsky to be Chairman of the Federal Trade Commission: Hearing Before the Senate Committee on Commerce, Science and Transportation*, S. Hrg. 104-290, 104th Cong. 13 (1995)

outcome of the preliminary injunction motion will decide the fate of the majority of transactions, and very few matters will be litigated further (although there is a range of explanations why this is so). For those few remaining matters, I would submit that it serves a valid public purpose for either DOJ or the FTC occasionally to have a merger case litigated to full conclusion, and cutting edge Section 7 issues explored thoughtfully by the agencies and the courts, rather than have merger law determined by a handful of preliminary injunction orders. The proposals to limit the FTC's ability to proceed with a case after the p.i., therefore, are unwarranted. The FTC has already imposed on itself a significant restraint – a detailed set of factors to consider concerning further litigation if a preliminary injunction is denied.[5] That practice has been conscientiously followed since its adoption, most recently in *Arch Coal*.[6]

Despite occasional minor differences in wording, courts entertaining injunction cases involving either DOJ or the FTC have applied a "public interest" test, rather than the "traditional equity test" for preliminary injunctions. For the FTC, Congress adopted this "public interest" standard through its enactment of § 13(b) in 1973, finding "that the traditional standard was not 'appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest mem,u200 TD(d with a ca8mentation of" te)r1.000009t4800 0.g.3al sta

[5] *See Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction* ("*Policy Statement*"), 60 Fed. Reg. 39,741 (1995).

[6] *See* FTC Docket No. 9316 (Statement of Commission accompanying closing of administrative proceedings June 13, 2005), available at http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf.

public interest standard was not new to § 13(b), however. Rather, this legislation represented a codification of the approach that courts had come to use in cases where a government agency was seeking interim relief while acting to enforce a federal statute. *Heinz*, 246 F.3d at 714; *FTC v. Weyerhauser Co.*, 665 F.2d 1072, 1081-82 (D.C. Cir. 1981); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C.0.00000 11smr0gTD/F11 12.0000 T e902odd

[7] The court superimposed 13(b)'s sliding scale and public interest standards on the threshold standard for private injunction actions: "To obtain a preliminary injunction, the Government must first "'meet the threshold burden of establishing (1) some likelihood of prevailing on the merits; and (2) that in the absence of the injunction, [it] will suffer irreparable harm for which there is no adequate remedy at law.' *Allied Signal, Inc. v. BF. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999)." *UPM-Kymmene Oyj*, 2003-2 Trade Cas. (CCH) ¶ 74,101 at 96,937.

injunctive relief, district courts have conducted proceedings that, in essence, amounted to full trials on the merits, preceded by costly and time-consuming discovery and consuming multiple weeks of trial time:

1. In *FTC v. Arch Coal, Inc.*

at 44, and appointed a special master. *Id*. at 67.

4. In *Staples,* the district court conducted a five day evidentiary hearing with live testimony from more than 13 witnesses (including four experts) and considered over 6.000 exhibits, "including declarations from consumers, industry analysts, economic experts, suppliers, and other sellers of office supplies. 970 F. Supp. at 1070.

In contrast, the ordinary rule in this District and elsewhere is for preliminary injunctions to be decided promptly, on the papers, with minimal live testimony or argument.[9]

It is of course true that the post-p.i. procedure is different in cases brought by the Division and the FTC. For the FTC, an administrative adjudication process is available. As Congress and the courts have observed, however, there is a useful role for an expert agency to play in exploring and applying Section 7. Judge Posner went so far as to find that "[o]ne of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act, which passed at the same time as the statute creating the Commission." *Hospital Corporation of America v. FTC,* 807 F.2d 1381, 1386 (7th Cir. 1986)(Posner J.).

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[9] *Cf. Allied Signal, Inc. v. BF. Goodrich Co.,* 183 F.3d 568, 577 (7th Cir. 1999) ("there is no general requirement that a district judge hear live testimony or conduct a hearing at all. The burden is on the party seeking such a hearing to establish that it 'has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue the injunction'" (citation omitted)).