Merger Review and Litigation Involving the Acquisition of Bankrupt Companies

BY STEPHEN M. AXINN

IN THE HART-SCOTT-RODINO (HSR) merger review process and the litigation that may follow, strategic decisions made by the merging parties, the Department of Justice, Federal Trade Commission (collectively, the Agencies), and third parties can be as important as the underlying antitrust merits in determining the outcome. This is even more so where the acquired company is in bankruptcy, as was demonstrated in the recent challenge brought by the DOJ to enjoin SunGard Data Systems Inc.'s acquisition of certain assets of the bankrupt Comdisco, Inc. *United States v. SunGard Data Systems Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001).

This article focuses on three areas: First, the strategic considerations concerning whether to seek to expedite or delay the merger review process; second, the consequences of a bankruptcy court's jurisdiction over antitrust challenges to the acquisition of a bankrupt; and third, the key considerations relating to the speed and procedure of the preliminary injunction hearing or trial on the merits.

The Speed and Timing of the Merger Review Process

General Considerations. The merging parties and the Agencies each must decide whether or not it serves its interests to expedite the HSR merger review process or allow it to proceed at a slower pace. In bankruptcy situations especially, it is often crucial to the parties to close the acquisition quickly in order to limit damage to the bankrupt's business, to retain key personnel, or to deny rival bidders time to mount a competing bid. But delay sometimes serves the parties' business needs as, for example, where the financing might not be fully locked-in at the time the bid is made or where it is deemed advantageous to obtain the approval of another domestic or foreign governmental agency before completing the antitrust review.

As a general matter, the Agencies are quite resistant to efforts by parties to advance or delay a merger review in order to secure some perceived tactical advantage. Nevertheless, merging parties often determine that it is in their interest to make efforts to control the timing of that process. Sometimes the Agencies will also choose to expedite or delay the process to secure a strategic advantage.

In cases that appear likely to be challenged, it generally is in the interest of the Agencies to manage the merger review process to allow sufficient time to conduct the review and evidence-gathering that the staff feels is necessary to convince the decision-makers in the Agencies (and ultimately a court) that the merger should be enjoined. Frequently, major merger reviews involve thousands of boxes of documents that must be reviewed and comprehended, numerous interviews of potential witnesses, and issues of great complexity that require the Agencies to secure the services of outside consultants or experts in order to reach an informed enforcement decision. This often results in a negotiation with the parties to obtain a "timing letter" pursuant to which the parties agree not to consummate the transaction until the agency can complete the merger review process. These negotiations can present difficult issues for the merging parties. On the one hand, the Hart-Scott-Rodino Act prescribes time limits on the agency's review, and the parties' management and shareholders normally are eager for the transaction to close without delay. On the other hand, the agency's request for additional time is usually accompanied by the implicit (and sometimes explicit) threat that if the request for additional time is refused, the arguments and positions of the parties will not be given the careful consideration they might otherwise receive.

If such an accommodation cannot be reached, the Agencies will have to move quickly through a merger investigation to avoid the "time squeeze" that will occur if the parties substantially comply with a large Request for Additional Information and Documentary Material ("Second Request") all at once and then refuse to delay the closing once the statutory HSR waiting period expires. This could force the agency to choose between having to file suit before it is ready and allowing the transaction to be consummated.[1]

***Pre-Complaint Strategic Decisions in* SunGard.** In SunGard's recent acquisition of Comdisco's "Availability Solutions" assets in the context of a bankruptcy proceeding, SunGard needed to obtain a favorable outcome in the merger review process in a very short time. Specifically, Comdisco and the Bankruptcy Court overseeing the Comdisco estate were faced with a competing bid from Hewlett-Packard Corp. (HP), a rival suitor that was arguing that its bid was the "highest or otherwise best offer" because the DOJ had allowed its HSR waiting period to expire without issuing a Second Request, while SunGard's bid appeared likely to be challenged.[2] Because Comdisco and the Bankruptcy Court would likely discount SunGard's bid if the DOJ sought an

Stephen M. Axinn is a senior partner in Axinn, Veltrop & Harkrider LLP, with offices in New York City, Washington, D.C. and Hartford, Connecticut. *The author's firm served as co-counsel in* United States v. SunGard Data Systems Inc. *The author wishes to express his appreciation to his colleagues John Harkrider and Michael Keeley for their assistance in the preparation of this article.*

injunction, it was important for SunGard to eliminate as much of the uncertainty as possible regarding its antitrust exposure before the court-ordered auction for the Comdisco assets occurred.

In order to expedite the merger review process, SunGard quickly filed its HSR notification[3] based on its status as a "qualified bidder" in the bankruptcy process, long before it had reached any agreement (or even a letter of intent) with the bankrupt. Indeed, HP had reached agreement with Comdisco to be the so-called "stalking horse" bidder[4] at the time that Comdisco filed for bankruptcy under Chapter 11.[5] While ordinarily a HSR filing cannot be made without at least having entered into a bona fide letter of intent, where the assets are subject to the jurisdiction of a bankruptcy court, the FTC Premerger Notification Office allows a filing to be made as soon as there is a good faith intention to acquire the bankrupt.[6] Thus, where the acquired company is in bankruptcy, there can be multiple HSR filings relating to the acquisition of the same assets. The availability of this procedure advanced the antitrust review of SunGard's potential acquisition of Comdisco by weeks.

The truncated fifteen-day initial waiting period applicable to acquisitions of a bankrupt's assets[7] meant that it was unlikely that SunGard could avoid a Second Request, but SunGard promptly met with the staff and voluntarily provided responses to an initial document request in an unsuccessful effort to avoid a Second Request. Possibly because of the initial voluntary production, the Second Request was less burdensome than it might otherwise have been, and the DOJ's initial request for information gave SunGard important insight into the DOJ's main areas of concern.

In order to ensure that valuable time would not be lost gathering documents and information, almost immediately after it announced its intention to bid for Comdisco's assets, SunGard began to identify, collect, and review the documents that it expected the Second Request to cover.[8] This allowed SunGard to submit all of the requested information and certify that it was in substantial compliance with the Second Request only eighteen days following its issuance, thereby triggering the truncated additional ten-day waiting period applicable when a Chapter 11 debtor is the seller.[9] SunGard complied with the Second Request on September 28 and the additional waiting period expired on October 9.

The staff fully cooperated with the parties in negotiating reasonable modifications to the Second Request, and the speed with which SunGard was able to complete its submission left the DOJ with less time to prepare for litigation. In addition to completing its compliance with the Second Request, SunGard presented the DOJ with a "white paper" that contained numerous customer witness statements in support of the transaction. The White Paper also contained support for SunGard's arguments that the market should include internally-supplied business continuity solutions as well as the services sold by SunGard, Comdisco, IBM, HP, and others.

Although SunGard made clear to the DOJ that a rapid conclusion to the merger review process was necessary if SunGard was going to be able to level the playing field in Bankruptcy Court, the DOJ did not provide its ultimate position on enforcement for several weeks. However, two days prior to the auction, the DOJ sent a letter to the Bankruptcy Court in which it stated that, while it had "no intention of seeking to intervene directly in the bankruptcy proceedings," it wanted the Bankruptcy Court to be aware that it had "decided not to open an investigation of [HP's agreement to acquire the Comdisco assets]," but that SunGard's bid was the subject of a "pending investigation" as to which there were "competitive issues still to be resolved." Bankruptcy Judge Barliant, however, had the court clerk send the letter back to the DOJ with the notation that it had not been read by the Judge.[10]

At the auction on October 11, SunGard's final bid was $825 million, which was significantly higher than HP's final offer of $700 million. Comdisco and the statutory creditors' and equity-holders' committees determined that SunGard's offer would be accepted at the confirmation hearing, which was scheduled for October 23. This did not end the battle in Bankruptcy Court, however, as HP submitted a new $750 million bid hours after the DOJ brought suit to enjoin SunGard from acquiring Comdisco. This new bid, however, was conditioned on its being accepted by November 5, three days before the antitrust trial was scheduled to commence in the district court. If the bid was not accepted, then HP's bid would revert to the original $610 million stalking horse bid. This had the effect of forcing Comdisco, its creditors and equity holders, and the Bankruptcy Court to accept the risk that if SunGard did not prevail against the DOJ, the Comdisco estate would lose $140 million. This caused the creditors' committee to switch positions and endorse the new HP bid over the SunGard bid.

The Bankruptcy Court scheduled a hearing for November 7 to assess the competing SunGard and HP bids (forcing HP to keep its new bid open through the hearing), and then continued the hearing through November 9. On the evening of November 9, a few hours after the antitrust trial ended in district court, the Bankruptcy Court disqualified HP's bid and thus approved SunGard's bid as the highest or otherwise best bid. In the end, it was apparent that SunGard's "hurry-up" strategy put SunGard's bid on a more equal footing with HP's because the antitrust risk was clarified. Rather than having to decide between the competing bids on the basis of speculation about the outcome of the antitrust challenge, the Bankruptcy Court was able to allow the antitrust court to rule on the merits, which it did on November 14.

Whether to Litigate in District Court or Bankruptcy Court

One of the issues affecting the strategies of merging parties (or potential merging parties, such as bidders) and the Agencies is the option of litigating a Section 7 claim in bank-

ruptcy court rather than district court. This option is rarely pursued, however, because the bankruptcy court is generally considered to be an inhospitable venue in which to challenge a merger that would have the effect of increasing the assets of the bankrupt's estate.

Jurisdiction of the Bankruptcy Court to Hear Antitrust Claims. Ever since the FTC found itself subject to the jurisdiction of a bankruptcy court during the auction of the Financial News Network in 1991, the Agencies have been very careful to avoid actions that might submit them to the jurisdiction of bankruptcy courts. In *In re Financial News Network, Inc.*, 126 B.R. 157, 161 (S.D.N.Y. 1991), the Bankruptcy Court ruled that it had jurisdiction to hear Section 7 claims affecting bankrupts and that the FTC would have to sue in the Bankruptcy Court to block CNBC from acquiring Financial News Network. This ruling was affirmed by the district court, which held that although the FTC's appearance merely to request an extension of the initial waiting period (under the since-revised Bankruptcy Code) "may not constitute a consent to the Bankruptcy Court's jurisdiction over any antitrust challenge that may ultimately result from the FTC's review," the FTC "in its actual appearances did more than merely request an extension." *Id.* at 160–61.[11]

The district court in *Financial News Network* also concluded that the Bankruptcy Court

> is legally competent to resolve antitrust issues raised by proceedings before it, and has entertained throughout those proceedings the comments of the FTC and the States. While those entities now protest that they never consented to the Bankruptcy Court's jurisdiction over their claims, by their earlier appearances they in fact attempted to prevent the Court's award of FNN to CNBC, and based their objections on antitrust concerns arising from their investigation of the proposed merger.

Id. at 161.

The DOJ's letter to the Comdisco Bankruptcy Court, in which it stated that it had "no intention of seeking to intervene directly in the bankruptcy proceedings," clearly sought to avoid giving the court a basis to assert jurisdiction. In the end, SunGard did not seek to force the DOJ to sue in bankruptcy court because SunGard was able to obtain an expedited trial schedule from the district court.

Bidders with Antitrust Issues. The primary beneficiaries of litigating Section 7 claims in bankruptcy court rather than district court are bidders whose bids raise antitrust issues and, by extension, the creditors and equity-holders that stand to gain from the ability of another bidder to drive up the purchase price. As it is an important goal of bankruptcy courts to maximize the estates of bankrupts, it is widely assumed that bankruptcy courts will have a tendency to subordinate public policies favoring vigorous enforcement of Section 7 of the Clayton Act in favor of results that ensure the highest possible price for a bankrupt's assets. In addition, if a bankruptcy court controls both the bankruptcy auction and the Section 7 suit, there is a reduced danger that the mere pendency of the Section 7 suit will cause the challenged bidder to be discounted or disqualified because the bankruptcy court controls the timing of both matters.

The Agencies. Conversely, the Agencies do not sue in bankruptcy court, presumably because they fear that a bankruptcy court might reject a valid Section 7 claim due to the court's interest in obtaining maximum value for the estate. Suing in bankruptcy court also prevents the Agencies from choosing to litigate in a forum of their own choice and prevents quick access to a court of appeals if they lose.

Rival Bidders without Antitrust Issues. It is difficult for rival bidders to raise antitrust issues directly in bankruptcy court. The most common approach is for a rival bidder to assist and encourage the DOJ or FTC to seek an injunction against a competing bidder. Rival bidders that do not face antitrust issues may also seek to undermine competing bids by arguing to the bankrupt and to statutory committees in the bankruptcy court that the competing bids should be discounted due to the risk they will be blocked by the government.

The Speed and Timing of Trial

Consolidation of the Trial on the Merits with the Preliminary Injunction Hearing. Once the decision to seek a preliminary injunction has been made, the DOJ and the merging parties must decide whether it is in their interests to seek to consolidate the trial on the merits with the preliminary injunction hearing.[12] DOJ officials have informally stated that it is the DOJ's general policy to seek consolidation, but that the DOJ will make that determination on a case-by-case basis. Reasons for the DOJ to agree to consolidate may include a desire to conserve resources or pressure from the district court to consolidate so that the court need not try the case again on the merits after ruling on the preliminary injunction motion.

On the other hand, consolidation raises the DOJ's burden from the traditional "likelihood of success on the merits" standard for preliminary injunctions to "a preponderance of the evidence" standard as in any other civil trial. While this may be more of a theoretical than a practical issue in most cases, in the *SunGard* decision, it appeared to be an important element in the court's decision, as the court ruled that certain products were in the relevant market due to the DOJ's inability to prove otherwise. 172 F. Supp. 2d at 192 n.24. Consolidation also eliminates the threat that the DOJ will continue to seek relief after losing a preliminary injunction, other than through an appeal. Consolidation may, however, result in longer trials because the court could be reluctant to restrict the DOJ's right to present evidence in a trial on the merits.

Trial by Paper v. Trial with Live Witnesses. Depending on the circumstances, the parties may wish to put on a lengthy and detailed case with live testimony, especially where they are relying on sophisticated economic evidence to establish their case or defense, or they may wish to submit the case

on affidavits and other papers. Of course, in the final analysis, each side must weigh the strength of their witnesses and the attitude of the judge towards the taking of live testimony. Many experienced defense counsel conclude that a well-prepared paper record is less likely to be upset by unforeseeable disclosures out of the mouths of witnesses who may make damaging statements on the witness stand no matter how well they may prepare. On the other hand, if the government is prepared to offer live witness testimony, defense counsel may be compelled to respond with live witnesses as well in order to respond to the live witness testimony and in order to attack the credibility of the Government's witnesses and establish the credibility of the defense's case. Live witness hearings nearly always require far more time, however, so that when time is of the essence, it is usually wise to seek to avoid a live witness hearing.

Seeking to Limit the Scope and Extent of the Hearing. It is routine for preliminary injunction motions in Section 7 cases to be tried in an expedited fashion with very limited pre-trial discovery and for courts to limit the number of witnesses and exhibits. It should be remembered that the Agencies have the benefit of extensive pre-complaint discovery through the Hart-Scott-Rodino process and the use of administrative subpoenas or Civil Investigative Demands. In addition, the Agencies normally conduct extensive informal interviews and rely on internal and external experts and on their historical expertise in many industries. Thus, when the DOJ or FTC files a complaint, they should not require very much additional pre-trial discovery. Moreover, in light of the high stakes in Section 7 cases, affecting the employees, management, and securities holders of the companies involved, every effort to bring these cases to a swift conclusion should ordinarily be considered.

Experience demonstrates that the scope and extent of the pre-trial discovery can be substantially reduced and the evidence offered can be distilled into much more "bite-sized" nuggets without losing any of its impact or probity. Counsel on both sides in merger cases are naturally anxious to make sure that every possible point is covered (usually two or three times) in the hopes that it will aid their side's case. However, what courts really want is the core of the case, which frequently can be presented quickly and succinctly, often on papers alone. The court in the *SunGard* case wrote an opinion that dealt comprehensively with all the issues presented by the parties even though the pretrial and trial phases of the case were completed in record time.

In *SunGard*, the merging parties pushed for and received an extremely expedited trial schedule in order to allow enough time for the court to rule before the Bankruptcy Court deadlines. The stipulated pre-trial order in *SunGard* limited discovery (e.g., the order limited depositions of fact witnesses to five per side and limited each deposition to seven hours; each party was limited to three expert witnesses, whose depositions were limited to ten hours). Strict and short deadlines also were imposed on the submission of pleadings (the DOJ's and SunGard's proposed findings of fact were due three and four days, respectively, after discovery closed). The order also required all direct testimony to be written, and limited live testimony to the cross-examination of expert witnesses. The court also held itself to the deadline of ruling on the case on the merits less than one week following the end of the trial. While this placed a great burden on the court and counsel for the parties, it did not prevent a full airing of the issues and a carefully considered decision.[13]

One can always speculate whether the outcome in *SunGard* might have been different had the trial proceeded at a more leisurely pace. However, in our view, the court considered and ruled on each of the DOJ's contentions in a deliberate and reasoned manner backed up by a voluminous record. Longer trials are not necessarily better trials; mistakes are made in long trials at least as often as in short trials. But when merger proceedings are prolonged, unfortunately the process, rather than the merits, often dictates the result. Even in this fast-moving situation, the DOJ staff conducted an investigation over a sixty-day period, with full access to tens of thousands of the parties' documents, assistance from a rival bidder, CID depositions, interviews of over one hundred witnesses, expert assistance and a large number of attorneys, economists and others. Many matters of equal or greater importance to the welfare of our nation are tried with far less opportunity for preparation by the Government or time and effort of the judiciary.

The result of the expedited trial in *SunGard* was that the district court dismissed the DOJ's complaint in time for SunGard to consummate its acquisition of Comdisco. The district court and the D.C. Circuit Court of Appeals both refused to enter a stay pending appeal and the appeal was thereafter abandoned.

Conclusion

While antitrust cases are decided on the facts and the law, sometimes the best substantive antitrust case can be undermined by the lack of a sound strategy for dealing with the merger review process, discovery, and trial. However, the *SunGard* case demonstrates the capacity of the Government, the parties, and the court to assimilate impressive amounts of complex information in an expeditious manner and reach a reasoned result without months or years of effort and expense. ■

[1] Theoretically, the agency could let the deal close and still bring a Section 7 suit after closing, although this is uncommon where an HSR review has been conducted before closing. However, where the parties cannot consummate the transaction because they are awaiting the approval of another regulatory body or, as in the case of SunGard, the Bankruptcy Court, the Agencies can allow the HSR waiting period to expire while still continuing their investigation.

[2] One consequence of this was that Comdisco decided to maintain a "neutral" position and did not provide much assistance to SunGard in preparing or making its presentations to the DOJ.

[3] 11 U.S.C § 363(b) (Supp. 2002) governs HSR filings where the acquired per-

son is a Chapter 11 debtor.

[4] As the "stalking horse" bidder, HP was able to negotiate a substantial "break-up" fee if it ultimately did not succeed in acquiring the assets. It was required, however, to leave its offer on the table (although it could and did improve it during the auction from $615 million to $700 million).

[5] 11 U.S.C. § 101 et seq. (Supp. 2002).

[6] ABA SECTION OF ANTITRUST LAW, PREMERGER NOTIFICATION PRACTICE MANUAL, Interpretation 280 (1991).

[7] 11 U.S.C § 363(b).

[8] It is often difficult to persuade clients of the desirability of preparing to respond to a Second Request before its actual issuance due to the enormous expense involved. But in this case, this decision ultimately proved to be crucial in speeding up the process in order to allow the court to reach a decision before the Bankruptcy Court's deadlines were reached.

[9] 11 U.S.C § 363(b) *and* 15 U.S.C. § 18a(e)(2) (Supp. 2002). The DOJ issued a Civil Investigative Demand (which, unlike a Second Request, does not affect the waiting period) to Comdisco, and Comdisco promptly submitted the requested documents and information.

[10] This had the effect of forcing SunGard to increase the amount of its offer at the auction because it sent a clear signal to Comdisco and its creditors of the DOJ's intention to sue SunGard but not HP.

[11] Specifically, the district court held that the FTC "requested that the Bankruptcy Court withhold approval of the Motion and Agreement until twenty days after FNN and CNBC provided additional information to FTC concerning the proposed merger" and that the *"FTC indicated that it would advise the court as to its findings." In re* Financial News Network, Inc., 126 B.R. 157, 161 (S.D.N.Y. 1991). Further, the district court ruled that "[a]t a March 27 hearing on FNN's "Emergency Motion" seeking to advance the auction date of FNN's operations to April 3, FTC made an appearance to oppose that motion." *Id.* Finally, the district court noted that "at the April 3 hearing and auction the FTC appeared again and participated in discussion of the auction's conduct." *Id.*

[12] Whether to consolidate generally is not an issue when the FTC seeks a preliminary injunction under Section 13 of the FTC Act, 15 U.S.C § 53(b) (2000), as the district court does not decide the case on the merits, an FTC Administrative Law Judge does.

[13] The D.C. Circuit Court of Appeals, in disposing of the DOJ's Petition for a stay pending appeal and an expedited briefing schedule, stated that the DOJ "has not demonstrated the irreparable injury or likelihood of success on the merits required for the injunctive relied sought." United States v. SunGard Data Sys., Inc., No. 01-5398 (D.C. Cir. Nov. 15, 2001).