# When Can an Action Be Brought to Enjoin a Merger?

BY MATTHEW L. CANTOR

Picture this: the two major manufacturers of widgets, who combined have a 75% market share and who happen to be your major competitors, are in discussions to merge their companies. You believe that the capital, marketing and distribution advantages that the merged-entity will achieve will effectively preclude you or other widget manufacturers from competing in the market because such a merger will raise the cost of doing business with actual and potential widget customers. Accordingly, you decide that you will institute an action, pursuant to the Clayton Act, which prohibits mergers that will substantially lessen competition or tend to create a monopoly in any market. You know, however, that the various antitrust authorities will be reviewing the merger to determine whether an action against these widget manufacturers should be brought on behalf of the public. Hence, a very real question arises: can you or should you bring an action while the antitrust authorities are reviewing the proposed deal?

The first question that must be answered is whether you can bring an action during the pendency of the government's antitrust review. In most cases, courts have not dismissed merger actions brought during the pendency of a government review. However, in a relatively recent decision, *South Austin Coalition Community Council v. SBC Communications, Inc.*, 191 F.3d 842 (7th Cir. 1999), Judge Frank Easterbrook — a renowned, but conservative appellate judge — affirmed the dismissal of a merger action when the Federal Communications Commission — whose regulatory analysis of actions have historically been informed by antitrust precepts — was still reviewing the deal. According to Judge Easterbrook, a lawsuit against the merging parties in that case was not yet ripe because the FCC might insist on structural changes to the deal which would make a lawsuit moot.

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Judge Easterbrook's ruling, however, causes concern in that most merger deals, even those worth billions of dollars, close virtually immediately after regulatory approval and antitrust clearance is provided. Would-be-plaintiffs, therefore, may find that the injunctive relief that they would have sought from a court to stop the merger, even in light of executive-branch clearance for the merger, is no longer a practicable remedy. In order to prevent this from occurring, plaintiffs may wish to argue that a court stay, rather than dismiss, filed lawsuits until after these proceedings are over, should it share Judge Easterbrook's view concerning the timing of private merger suits. A stay that would expire ten days after government clearance would provide a private party with enough time to seek a preliminary injunction even if the merger is approved by the Department of Justice or Federal Trade Commission without significant divestitures.

The next question is whether a private party should bring an action while the subject transaction is being reviewed by executive agencies. This answer, of course, will depend upon the business risks that a completed merger would pose to the company, the costs that the company is willing to incur in order to stop the contemplated merger, the merits of the possible antitrust case and expected action by government agencies concerning the merger. Obviously, such questions would have to be answered on a case-by-case business.

In sum, companies that believe that a particular merger would harm their business and competition in general should be careful to analyze whether or when, in light of precedent and favorable public policy arguments, they should bring Clayton Act suits for injunctive relief. ❧

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