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Teaching Merger Law Through In-Class Simulations

Spencer Weber Waller

Loyola University Chicago School of
Law

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I. INTRODUCTION

This short article outlines how I have taught the mergers and acquisitions section of my basic antitrust law course for the past five years. Instead of relying on casebooks, the black letter law, and merger guidelines, I use an in-class simulation that moves the students from passive to active learning over a two- to three-week period. Having experimented with various formats for the simulation, I am convinced that adding such an exercise better conveys the content and process of modern merger practice and gives the students a taste of what the practice world holds in store for them.

In this article, I describe my general approach to teaching antitrust law and then discuss the process for the annual merger simulation. I follow with a description of the excellent argument students presented this year based on the now abandoned National Cine-Media (“NCM”) acquisition of Screenvision. As fate would have it, our simulation concluded two days after the parties announced they had abandoned the transaction in the face of the complaint filed by the Justice Department’s Antitrust Division (“DOJ”). This did not deter the students who pressed on with a spirited in-class hearing on a motion for a preliminary injunction. I conclude with brief thoughts about the value of such simulations in a rapidly changing environment for legal education.

II. TEACHING ANTITRUST LAW

I have taught the basic antitrust course at two different U.S. law schools for nearly 25 years. Depending on the year, I have had as many as 75 students and as few as 14. The students are almost all second- or third-year JD students with the occasional LLM or MBA student in the mix.

Most students in my course (and Loyola) come to law school with one to four years of work experience, although nearly 30 percent enter straight from college. Relatively few have any significant economic training or antitrust related work experience and many glaze over, or begin to twitch, when simple math is involved. I tell them on the first day that antitrust law inherently involves economic concepts and reasoning, but almost everything can be explained intuitively. I also offer to have a separate session to explore the more technical aspects of the material we will be covering, but students rarely take advantage of the opportunity.

Over the years I have rotated through various editions of most of the mainstream antitrust casebooks. This year I am using the third edition of Eleanor Fox’s excellent *U.S.*

¹ Professor and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, swalle1@luc.edu. Thanks to Steven Cernak, Laura Matalon, Matthew Sag, and Christopher Sagers, for their comments on earlier versions of the article.

*Antitrust in Global Context.*² I cover most of the material in the book in order, from the development and meaning of the rule of reason, the rise of the *per se* rule to deal with hard-core cartels, monopolization, and then mergers and acquisitions. After the merger simulation, the course continues with non-*per se* competitor collaborations, vertical agreements, and some closing materials on enforcement and institutions. I generally skip some more advanced material on intellectual property-antitrust issues³ and the price discrimination section. By the time we arrive at the merger section, we have covered issues of market definition, market power, and entry barriers, setting the stage for the merger materials.

I teach the course through a fairly standard soft Socratic method. I designate two students to be on call for each class and begin the discussion with them before bringing the rest of the class into the discussion. We cover the assigned cases, some of the guidelines, and occasionally foreign materials as a comparison. We also discuss and role-play problems from the casebook and my original written problems and exercises. Students complete a four-page written answer to one problem of their choice during the semester, which effectively functions like a practice mid-term.

Merger law poses special challenges for classroom teaching. The Supreme Court cases are old and almost entirely unrepresentative of modern merger practice.⁴ The handful of modern lower court decisions are the exception given that most mergers and acquisitions raising serious antitrust issues are resolved through negotiated settlements or abandoned.⁵ It is hard to convey to students the administrative, negotiation, and lobbying nature of merger practice where the center of the gravity is the dialogue with the agencies rather than litigation. Of course, the law matters, but merger and acquisition practice is more often bargaining with the government in the shadow of the law.

III. THE STRUCTURE OF THE ANNUAL SIMULATION

The merger materials in any basic antitrust law course cry out for the students to learn by doing.⁶ This type of active learning has two advantages over traditional lecturing and soft Socratic dialogue. First, active learning requires the student to apply material to problem solving rather than absorbing concepts in the abstract. As a result, students both learn and perform better than through passive learning.⁷ Second, active learning, problem solving, and working in

² ELEANOR M. FOX, *CASES AND MATERIAL ON U.S. ANTITRUST IN A GLOBAL CONTEXT* (3d ed. 2012).

³ We have a separate IP-Antitrust seminar that covers these issues in detail.

⁴ See e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁵ We do discuss such cases as *FTC v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997); *United States v. H&R Block*, 833 F.Supp.2d 36 (D.D.C. 2011); *United States v. Baker Hughes Inc.*, 908 F.2d (D.C. Cir. 1990); *FTC v. H.J. Heinz*, 246 F.3d 708 (D.C. Cir. 2001); and the DOJ closing statements for the XM Sirius merger, which are excerpted in the casebook.

⁶ Such techniques can be traced back to the general education theories of John Dewey. JOHN DEWEY, *EDUCATION AND EXPERIENCE* (1938).

⁷ See ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 90-92 (2007), available at http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf; Patricia W. Hatamyar Moore, *The Impact of Active Learning Sessions on Law School Performance: An Empirical Study*, 3 J. MULTIDISCIPLINARY RES. 67 (2011); and Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003).

teams more closely resembles what lawyers do in practice. So rather than lecturing and questioning the students on the 150 pages of merger materials, the students participate in a simulation of a currently pending merger investigation or an unresolved case.

I try to pick an industry that is not very technical and which the students will encounter in their daily lives. In past years I have based the simulations on then pending acquisitions involving American-U.S. Air, United-Continental Airlines, ATT-T-Mobile, and Anheuser Busch-Grupo Modelo.

I assign the students to two teams representing the government agency reviewing the deal and the respondent corporations. To add a degree of reality, I assign at least 60 percent of the students to the corporate side and no more than 40 percent of the students to the government team. I then assign each student to one of the standard issues in merger analysis: market definition, market share/market power, entry barriers, theories of harm, efficiencies, remedies, and failing firms when relevant. I frequently assign two students to some of the key issues for the corporate side. Obviously, many of these issues overlap and the students know they will be cooperating closely once they have mastered the law and publicly available facts for their issue.

I limit my input to brief in-class comments and short recorded lectures posted on the class website laying out the essentials of each critical issue, but leave the majority of each 75-minute class session for the students to work on their issues and with their teammates. I remain in the classroom to provide feedback and answer questions as they arise.⁸

The simulation normally covers four class sessions after an introductory lecture on the development of modern merger law and setting up the simulation. The first class session is for students to get organized with their teammates, reread the material on their assigned issue, and discuss the public information on the deal, which I post on the website. I also ask the students to post on the class website any important publicly available information they uncover for both sides to use in their analysis and arguments.

During the second session the students share information and arguments with their teammates and begin to formulate their positions. The third session is devoted to the first round of negotiations between the government and the parties to the transaction. The students continue their work on their team issues outside of class as well, consistent with their other classes and obligations.

During the fourth and final session, the teams finalize any settlement and then present the proposed consent decree to me for approval as the presiding federal judge. Each side must prepare a collective powerpoint presentation of no more than two slides for each issue containing both law and facts from the public record. The students assigned to each issue briefly present their arguments and answer any questions from the bench in a mock Tunney Act hearing.⁹

In the event that the teams do not reach agreement on a consent decree and an appropriate remedy, the final session is instead a hearing on the government's motion for a

⁸ This is a version of what has come to be known as a flipped classroom. See e.g., THINGS YOU SHOULD KNOW ABOUT...™ FLIPPED CLASSROOMS, available at <http://net.educause.edu/ir/library/pdf/ELI7081.pdf>.

⁹ 15 U.S.C. § 16.

preliminary injunction before me as the assigned federal judge. In either format I always take the matter under advisement and issue my “decision” at a later class when I also provide feedback on the slides and arguments and answer any remaining questions.

Obviously one can only go so far in a classroom simulation in five sessions without access to the actual confidential documents and expert testimony that the parties and the government would have in the real world. However, the students for both sides take the exercise extremely seriously, present relevant and sophisticated arguments about the key issues in the merger, and usually reach an outcome strikingly similar to what occurs in the real world.

IV. THE NATIONAL CINE-MEDIA/SCREENVISION ACQUISITION SIMULATION

On May 5, 2014, NCM announced that it entered into a definitive merger agreement with Screenvision, for \$375 million of cash and stock.¹⁰ The two companies were already the two largest operators of in-theater digital media networks in North America. In-theater digital media networks is a fancy term for the 20- to 30-minute pre-movie packages of advertisements and behind-the-scenes features on upcoming television and movie productions that run on the screen prior to the trailers and the feature film.

The CEO of NCM stated that:

We are very excited about our merger agreement with Screenvision as it will position the combined new company to be much more competitive in the expanding video and overall advertising marketplace, including the new online and mobile advertising platforms. With the investments we will be making to create one more efficient national network, I am confident that we will bring more advertising revenue to our theatre circuit partners and a higher quality pre show to their patrons.¹¹

In November, the DOJ brought suit to enjoin the merger. According to the DOJ’s complaint, NCM and Screenvision together serve 88 percent of all movie theater screens in the United States through long-term, exclusive contracts.¹² The head of the DOJ stated:

The proposed combination of NCM and Screenvision is a bad deal for movie theaters, advertisers and consumers. This merger to monopoly is exactly the type of transaction the antitrust laws were designed to prohibit.... If this deal is allowed to proceed, the benefits of competition will be lost, depriving theaters and advertisers of options for cinema advertising network services and risking higher prices to movie goers.¹³

This semester’s antitrust class began in late January 2015 and was ready to tackle the merger materials by late February. I posted on the class website the relevant public information to get the students started on their research. We had three sessions along the lines described

¹⁰ National CineMedia, Inc. Announces Acquisition of Screenvision, (May 5, 2014), *available at* <http://investor.ncm.com/releasedetail.cfm?ReleaseID=845350>.

¹¹ *Id.*

¹² Justice Department Files Antitrust Lawsuit to Stop National Cinemedia from Buying Screenvision, (Nov. 3, 2014), *available at* <http://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-national-cinemedia-buying-screenvision>.

¹³ *Id.*

above¹⁴ prior to the Loyola early-March spring break, and the first formal negotiations on Monday, March 16 immediately after the break.

At the end of class that day, the student teams informed me that they were unable to reach agreement on a consent decree. This year the parties were not close to reaching a settlement. Per my instructions, the government rejected a two-year price freeze as an inappropriate form of relief. In addition, the government team independently rejected an innovative proposal for the movie theater chains to diminish their existing partial ownership stake in NCM. However, both sides learned a great deal about what the opposing side would argue and were able to better preemptively address those issues in their own presentations. I therefore scheduled the mock hearing on the government's request for a preliminary injunction for Wednesday, March 18.

As fate would have it, the parties in the real world announced later that day, on March 16, that they were terminating the merger in light of the government's opposition.¹⁵ However, our student litigators were not deterred and appeared before the Honorable Spencer Weber Waller of the United States District Court of Loyola on the morning of the March 18 to argue the motion for a preliminary injunction that would never be presented in open court in the real case.

The seven-member government team presented brief oral arguments on each relevant issue accompanied by a powerpoint for the benefit of the court, and opposing counsel followed by a similar presentation by the eleven-person corporate team.¹⁶ Each side's total presentation was approximately 30 minutes long.

The government relied on the 2010 Horizontal Guidelines¹⁷ to argue that the relevant market was a national market for in-theater pre-show advertising packages. The government then argued that the proposed transaction was likely to injure both advertisers and movie theater chains. The students argued that the merger would produce a new entity with 88 percent of the relevant market with only a small remaining fringe of competitors. The plaintiff invoked, but did not rely, on the *Philadelphia National Bank* presumption.¹⁸ They calculated the relevant HHIs and cited examples from the FTC Merger Commentaries¹⁹ in support of their argument that the merger would produce meaningful market power.

The government relied on a theory of unilateral effects where both advertisers and movie theater chains would likely be subject to price increases for which there were no reasonable alternatives. They also argued that the acquired company was a maverick within the meaning of

¹⁴ *Supra* at III.

¹⁵ David McNary, *National CineMedia, Screenvision Abandon Merger*, VARIETY (March 16, 2015), available at <http://variety.com/2015/film/news/national-cinemedia-screenvision-abandon-merger-1201453742/>.

¹⁶ Copies of the student powerpoints are available on request at swalle1@luc.edu.

¹⁷ U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines at §3 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

¹⁸ *United States v. Philadelphia National Bank*, 374 U.S. 321 (1964).

¹⁹ U.S. Dep't of Justice & Federal Trade Commission, Commentary on the Horizontal Merger Guidelines (2006), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf>.

the Guidelines and that publicly available company documents from NCM showed that Screenvision was a “direct threat” that would be eliminated by the merger.²⁰

Anticipating the defendants’ arguments, the government presented publicly available facts that the existing fringe competitors, advertising firms, and other potential entertainment industry firms were not viable entrants or able to expand sufficiently in a timely fashion to eliminate the competitive harm that would be created by the proposed merger. The government also argued any resulting efficiencies were not merger-specific and failed to justify a merger to near monopoly levels.

As to remedies, the government argued that it had demonstrated a likelihood of success on the merits and that no reasonable consent decree would cure the competitive injury of the acquisition. Partial divestitures were not possible given the structure of the industry and the lack of available buyers who could preserve competition. Other proposals to divide up the companies by region, like the Baby Bells, were unrealistic and probably would make matters worse.

Counsel were responsive to my questions and cited chapter and verse from the Guidelines and modern cases in support of their arguments. My favorite response came when I asked the government to describe the types of witnesses they would have called in a real PI hearing, they responded: “An economic expert, advertising executives, non-chain movie theater owners, and George Clooney.”

Defense counsel argued in an equally professional manner. Not surprisingly, they focused on market definition. They argued that pre-show advertising packages in movie theaters were part of a broader general advertising market and the combined shares of the parties represented less than one percent of the broader relevant market. They argued the “economic realities” of advertising and the desire of advertisers to reach audiences across the broadest range of advertising medium. They cited publicly available documents of the acquired firm stating that it viewed itself as competing with television and cable networks, and cited the FTC’s closed investigation of the Google/AdMob acquisition²¹ in support of their broader market definition. They further argued that, even in a relevant market for demographically targeted advertising, in-theater advertising was an insignificant component of targeted web advertising which typically could be even more narrowly targeted than merely the nature of the film being shown (*Frozen* versus *Fast & Furious 7*).

The defendants’ alternative argument was that they competed with advertising and other content on cell phones and tablets for consumers during the period of time while they were in the movie prior to the start of the show. I particularly liked their statement that “advertisers want eyeballs not channels.” On the consumer side, the defendants argued that the revenues the theaters received from these ad packages were such a small percentage of their revenues that ticket prices were unlikely to be affected by the merger in either direction.

²⁰ The students also presented an argument based on raising rivals costs involving the vertical aspects of the merger, which are beyond the scope of this brief summary.

²¹ Statement of the Federal Trade Commission, Google/AdMob, FTC File No. 101-0031 (2010).

The defendants further argued that entry barriers were low. They contended that there were no legal or regulatory barriers to entry, capital costs were low, digital technology made new entry reasonable, and that a host of international advertising holding companies, social media firms, movie and television studios, and other entertainment and marketing entities were capable of entering the field to both create and offer movie chains these pre-show packages.

The defendants' efficiency arguments revolved around the notion of "a one-stop shop for advertisers." In addition to pointing to \$30 million of projected cost savings, the defendants argued that the merger would allow the combined companies to develop more interesting interactive entertainment products and encourage moviegoers to come to the theaters earlier for a new and better type of entertainment that started well before the feature film.

The defendants used the remainder of their time to propose terms for a consent decree to remedy any potential harm if the court found in favor of the government. They proposed allowing the merger with a combination of:

1. Limitation on the time and scope of the exclusive contracts between the defendants and the movie theater chains;
2. A two-year prohibition on price increases with advertisers or revenue share decreases with theater owners;
3. Partial divestitures of the shares that movie theater chains currently owned in NCM to properly align incentives; and
4. Anti-retaliation provisions.

On rebuttal, the government focused on market definition and entry issues. It argued that the unique role of the defendants as brokers between two different industries made entry unlikely and harm inevitable. Tech startups, advertising firms, and even established social media firms lacked the connections and the incentives to enter this stagnant niche market. The government also pointed to the defendants' membership in the Screen Advertising Association, which defines itself as different from other types of advertising.²² The government dismissed the defendant's proposal for a consent decree as inadequate and requested the entry of a preliminary pending trial.

The court took the matter under advisement and the students left for their other classes and to prepare for the next unit of antitrust the following week.

V. CONCLUSION

I am convinced that there are effective ways to introduce more simulations, role playing, active learning, and a greater air of reality to teaching antitrust law. The particular merger exercise I have described is only one of my efforts throughout the semester to go beyond the traditional teaching methods that remain the mainstay of most law school classes.

I hope that other professors have equally innovative ways of going beyond the cases and guidelines to teach the modern reality of antitrust law, policy, and practice. I look forward to

²² The students probably were referring to the Screen Advertising World Association, <http://www.sawa.com/>.

trading best practices and responding to any suggestions that will help me improve this exercise and add others in future years. I would also urge any full-time or adjunct professors to try their own versions of this type of simulations.²³

I am proud of how the students rise to the occasion and take their roles and arguments seriously. It is exciting and deeply gratifying to watch the students learn by doing and taking on a representative, though limited, version of the professional roles they will be expected to play after graduation.

²³ See also Steven Cernak, *Antitrust Simulations* (2014), which contains excellent materials for in-class simulations for several antitrust issues.