AMERICAN ANTITRUST INSTITUTE

"THE ROLE OF AMICUS BRIEFS IN MERGER ADVOCACY"
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1. Amicus briefs play a small but important role in merger advocacy.
2. They play a small role in the sense that "good" amicus opportunities are few and far between.
    a. Although 9 out of 10 antitrust cases typically are brought by private plaintiffs, merger enforcement is one area where public enforcement is not supported by robust private enforcement. You don't see as many private competitor suits because courts have put severe prudential standing hurdles in front of competitor plaintiffs, and you don't see as many consumer suits because merger harm is often prospective, and a consumer may not be interested in committing the time and resources to fight harms not yet suffered.
    b. Moreover, 95% of mergers are granted early termination by reviewing agencies.
    c. If a Second Request issues, you sometimes see concerns resolved during the investigation.
    d. If agencies still have concerns at the close of a Second Request, the vast majority of disputes will end in a negotiated consent decree.
    e. If the dispute gets to the point where a complaint is filed, often the transaction will be abandoned.
    f. So it's the rare case that gets litigated to a district court judgment. And if it does, and the merging parties lose, there is yet another opportunity for the merging parties to walk away. So it's especially rare for a merger case to make it to a "policy-making" court, such as a federal court of appeals or the U.S. Supreme Court. Hence there are

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few "good" amicus opportunities in front of courts that will have widespread influence.

3. Amicus briefs nonetheless play a very important role in merger advocacy in the sense that scarcity of "good" amicus opportunities breeds value in those opportunities. The absence of opinions means there are very few signposts from the courts to influence negotiations in the trenches between the agencies and the merging parties. The opportunity to influence new signposts can be critical.
    a. Consider "happy" and "sad" examples for antitrust merger enforcement, both of which are illustrative of the important role amicus briefs can play.
    b. A "happy" example is FTC v. Phoebe Putney.
        i. The FTC sued to enjoin a hospital merger to monopoly in a county in GA. The defendants asserted that they were immune from antitrust scrutiny under the state action doctrine. This was borne of the unique fact that a public hospital authority controlled the acquiring hospital.
        ii. The state action doctrine is a qualified antitrust immunity for sub-state entities. Although arms of the state enjoy sovereign immunity under the Eleventh Amendment, sub-state entities do not. But such entities can claim a qualified antitrust immunity if they are carrying out clearly articulated and affirmatively expressed state policy to displace competition and are actively supervised by the state.
        iii. It was the immunity question, rather than merits of merger, which got litigated all the way to the Supreme Court. The question was whether a grant of ordinary corporate powers gives rise to state action immunity.
        iv. Justice Sotomayor wrote the majority opinion, which ruled in favor of the government and narrowed the scope of exemption. Consider what was at stake, and the significance of the amicus opportunity. If the FTC had lost, a whole category of mergers – those involving sub-state entities given ordinary corporate powers – would effectively be carved out of federal antitrust. Because it didn't lose, the FTC remains free to credibly

challenge those mergers, and the shadow effect of the Court's opinion will drive future negotiations between the agencies and merging parties.

c. A "sad" example is FTC v. Lundbeck
    i. The FTC sued a drug maker that acquired the only other drug used to treat a particular infant heart defect and then proceeded to raise the price of the drugs by 1300% (from about $77 per use to about $1500 per use).
    ii. If ever there were a textbook example of what should be a slam dunk antitrust violation, this seemed to be it. But the district court grew enamored with economic theory to the point of nearly ignoring the evidence. The district court concluded that the two drugs didn't compete because of low cross-elasticity of demand. Thus the district court held the drugs weren't in the same product market, and effectively, this wasn't a horizontal merger.
    iii. The Eighth Circuit affirmed, albeit tepidly, raising questions about the district court's analysis but deferring heavily to the "clearly erroneous" standard of review for factual findings on appeal.
    iv. Once again, consider what was at stake and the quality of the amicus opportunity. If the FTC had won, probably not much would have changed. But because the FTC lost, a permissive message was sent to everybody in the economy who was considering an otherwise obviously problematic merger. Indeed, shortly after the opinion came down, several corporate law firms sent out "client alerts" that said basically the same thing: deals that you previously thought would be sure draw a challenge are now less sure to draw a challenge. The Lundbeck case acted much like an invitation to take a run at an obviously questionable or problematic merger.
    v. As an aside, this is probably a case where the shadow effect had even more significance than the legal precedent. The legal significance was diminished by the fact that market definition is a frequently litigated issue in many antitrust cases, beyond just

merger cases, and also by the Eighth Circuit's tepid affirmance. But when merging firms see a merger to monopoly followed by a 1300% price increase pass muster, they are likely to feel especially emboldened.

4. Conclusions
    a. While very few merger cases go up to a federal court of appeals or beyond, the ones that do go up tend to be very significant. Even if they are fact specific, they can have tremendous influence simply because of the manner in which the agencies typically handle mergers and the manner in which merger disputes are typically resolved.
    b. Probably most of the organizations represented here today have filed amicus briefs and are well aware of the many different rationales for filing them. Usually it is to make a technical legal or policy point. On some level, however, amicus briefs also have symbolic significance. In merger cases, where it's often styled as government versus big business, there can be ideological creep, and it may be tempting for judges to get lost in philosophical questions about exactly how much faith one should place in the free market. An amicus brief by a consumer organization can be a very helpful reminder, symbolically, that mergers actually affect peoples' lives in serious and important ways.

THANK YOU