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About the Graphics... Tycho Brahe (1546-1601) conceptualized the universe as being centered on the Earth with some planets orbiting the Sun. The “universe” is a graphic representation of Brahe’s conception and is taken from *De Mundi Aetherei Recentioribus Phaenomenis* (Prague 1602). For a description of the Icarus myth, see Ovid, *Metamorphosis* at VIII (lines 183-235). We would also like to give Jean Tumbaga a special thanks for her advice on the graphical layout and organization.

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Resolving Complex Antitrust Cases Promptly

Summary

In recent years, it has often been asserted that the Sherman Antitrust Act is ineffective in curbing anticompetitive abuses in rapidly-changing high-tech industries because by the time a meaningful judicial resolution can be obtained, advances in technology will render moot any relief granted by a Court. Based on the recent Microsoft trial, appeal and subsequent settlement, one might be tempted to agree with this assessment. The recent case of *United States v. SunGard Data Systems Inc. & Comdisco, Inc.*, 172 F. Supp.2d 172 (D.D.C. 2001), tried before U.S. District Judge Ellen Huvelle in Washington, D.C., however, illustrates that a complex antitrust case can be tried expeditiously and in a way that does not harm the process or the result. Moreover, what was done in SunGard can be repeated in other complex matters, and not just antitrust matters. The main requirements are a strong judge and a reasonable level of cooperation among counsel, both of which were present in SunGard.

The SunGard Case

SunGard was a suit for injunctive relief brought by the Antitrust Division of the U.S. Department of Justice (“DOJ”) under Section 7 of the Clayton Act. DOJ sought an injunction to prevent SunGard Data Systems Inc. (“SunGard”) from acquiring the Availability Solutions assets of Comdisco, Inc. (“Comdisco”) on the grounds that the acquisition would lessen competition in the market for “shared hot-site disaster recovery services.”



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Both SunGard and Comdisco provided companies with a wide array of “disaster recovery” or “business continuity” services. These services quickly restore a company’s computer processing capability in the event that a company loses the ability to access its own computers following a man-made or natural calamity, such as a flood, earthquake or terrorist attack. DOJ claimed in its complaint that SunGard and Comdisco were two of only three providers of “shared hot-site disaster recovery services” and that the acquisition would lessen competition in the market for such services. SunGard and Comdisco countered that the relevant market was much broader and that the acquisition would in fact benefit consumers. In addition, the defendants claimed that the market was rapidly evolving from one in which customers relied on commercial hot-sites to back up traditional main-frame computers to one in which companies installed networks of distributed high-capacity servers which enabled them to provide inexpensive internal backup for their networks without the need of commercial hot-sites.

Why the SunGard Case Moved So Fast

The assets that were the subject of this action were owned by Comdisco, a firm that had filed for bankruptcy protection in the Northern District of Illinois in July. Comdisco had selected Hewlett-Packard (“HP”) as the so-called “Stalking Horse” bidder, which meant that unless the Bankruptcy Court determined that some other bidder presented a “higher or otherwise best” offer during the bankruptcy auction process, HP would be selected as the purchaser of these assets. In addition, in anticipation of the fact that the sale of the business would have been completed soon thereafter, the Bankruptcy Court had approved Comdisco’s request to make significant “retention payments” to several key Comdisco personnel on November 15. However, if these payments were made prior to the time that SunGard was able to exercise effective control over the company, SunGard would not be in a position to make the necessary commitments to these key employees to ensure that they did not simply “take the money and run.” Thus, unless SunGard was cleared to complete the acquisition prior to November 15, it ran the substantial risk that it would be required to pay \$825 million to purchase a business whose key personnel might no longer be there.



How the SunGard Court Tried the Case So Fast

At noon on October 22, the day prior to the Bankruptcy Court confirmation hearing, DOJ filed suit against SunGard in Washington. Together with the complaint, DOJ filed a motion for a temporary restraining order and a preliminary injunction. To enable SunGard to resolve the DOJ suit before the November 15 retention payments to key Comdisco employees, and to prevent the mere filing and existence of DOJ's suit against SunGard from scuttling SunGard's chances of being confirmed by the Bankruptcy Court, counsel for SunGard immediately sought a hearing before Judge Huvelle to request an expedited schedule. At that hearing, counsel for SunGard requested a schedule that provided for discovery and a trial to be completed by November 15. The Court urged the parties to negotiate an acceptable schedule and, after some negotiations, an agreement was reached the next day.

The Order called for specific limited discovery, and for pre-trial memoranda not to exceed 10 pages per side, provided that fact witnesses would testify through written declarations, and set short deadlines for the filing of pleadings. It also provided for consolidation of the trial on the merits with the preliminary injunction hearing pursuant to Fed. R. Civ. P. 65(a).

The ability of the Court and the parties to conduct pre-trial discovery and a trial on the merits within three weeks of the filing of the complaint was aided by the fact that SunGard and Comdisco already had produced documents and interrogatory responses to DOJ as part of the Hart-Scott-Rodino Second Request process. SunGard produced 600 boxes of documents and Comdisco over 100 boxes. Moreover, DOJ had already interviewed dozens, if not hundreds, of SunGard's and Comdisco's customers and competitors (whose names had been provided by SunGard and Comdisco) during its two-month investigation leading to the filing of the complaint.

The Scheduling Order limited the parties to twelve fact witnesses per side (neither side actually proffered all twelve witnesses they were allowed). Further, 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. DOJ deposed five fact witnesses and two expert witnesses and SunGard deposed four fact witnesses and one expert witness over a three-day period (in several different cities).



At trial, the parties submitted over 400 documentary exhibits between them, including over 100 customer declarations, some favoring the transaction and others opposing it. Both sides submitted proposed findings of fact that integrated the key exhibits and deposition testimony.

The Court ordered one and one-half days of live proceedings, consisting of one full day of live cross-examination of the experts and one morning of closing arguments, including frequent questions from the Court. Five days following closing arguments, the Court rendered a 36-page opinion that discussed and analyzed the pertinent exhibits and testimony and made credibility determinations. It was clear from the Court's questions and the written opinion that the Court digested an enormous amount of evidence and fully understood the arguments of both sides. The Court ruled for SunGard, and DOJ ultimately decided not to pursue an appeal.

Implications of SunGard for Other Complex Cases

The speed with which the SunGard case was tried shows that it need not take years to try a complex antitrust case. While not every complex antitrust case can or should be tried in three weeks' time, the time it takes to conduct discovery and try a case should not preclude the application of the Sherman Act to fast-moving high-tech industries. While SunGard was a Clayton Act case and Microsoft a Sherman Act case, the issues are no more dense or complex in one than the other. The discovery tools used by parties are the same in both types of action and the trials both are governed by the normal Federal Rules of Civil Procedure.

There is a very important public welfare goal in obtaining judicial review that is timely and efficient. A speedy resolution not only provides immediate benefits to the winner, but the court decision provides guidance to the bar in resolving other matters. The thorough and well-reasoned opinion issued by Judge Huvelle proves that it is true that even with truncated discovery and live proceedings, the important evidence will be found and presented by counsel. Thus, little is lost in the truth-finding process by curtailing and compressing discovery. However, a premium certainly is placed on the ability of counsel to focus on the essential issues and facts.



Endnotes

1 The author was counsel to SunGard Data Systems in the case discussed in this article. I would like to extend thanks to my colleague, Michael L. Keeley, for his assistance in the preparation of this article.

