

ANTITRUST ALERT

***FTC V. INOVA* AND THE FTC'S NEW PLAN FOR MERGER REVIEW**

The Federal Trade Commission (FTC) has proposed an overhaul to the rules governing the conduct of administrative trials before administrative law judges (ALJs) for merger challenges.¹ Unlike the Department of Justice, the FTC has the option of pursuing its merger cases within its own "Part 3" adjudicatory system and need not rely solely on the federal courts. Many observers feel—and the commission clearly intends—that the new rules will significantly strengthen the commission's hand in challenging mergers.

The commission's recent challenge to the acquisition of Prince William Health System by not-for-profit hospital chain Inova Health System Foundation provides an instructive case study of what merger challenges under the FTC's new regime might look like. In *Federal Trade Commission et al. v. Inova Health System Foundation et al* ("*FTC v. Inova*" or "*Inova*"), the commission utilized many of the procedural tactics that have been codified in the new proposed rules to great success, culminating in Inova's June 6, 2008, announcement that it was abandoning the acquisition in response to "unusual process changes by the [FTC]."²

The commission's tactics in *Inova* provide important guidance for merging parties who may find themselves in the agency's crosshairs either before or after the implementation of the new rules. The ramifications for merging parties—and the fate of their mergers—could be significant, particularly if the parties cannot keep their transaction intact while the FTC's proceedings, which have traditionally taken far longer than DOJ and FTC injunction proceedings in federal court, run their course.

¹ Press Release, Federal Trade Commission, FTC Seeks Comments on Proposed Amendments to its Rules of Practice Regarding Adjudicative Proceedings (September 25, 2008), available at <http://www.ftc.gov/opa/2008/09/nprmp3.shtm>; see also 16 CFR Parts 3 and 4 Rules of Practice; Proposed Rules, 73 Fed. Reg. 58832 (proposed Oct. 7, 2008).

² Press Release, Inova Health System, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), available at <http://www.inova.org/news/2008/inovapwhsmergerstatement.jsp>.

***INOVA* AND THE COMMISSION'S NEW PROCEDURAL APPROACH**

Prior to *Inova*, the commission's usual practice in unconsummated merger challenges was to forgo its own administrative proceedings while the parties litigated an expansive preliminary injunction proceeding in federal court. For example, in *FTC v. Tenet Health Care Corp.*, the FTC filed its preliminary injunction, litigated a five-day court hearing with live witnesses and awaited the District Court's ruling before even filing an administrative complaint.³ In other challenges, the commission would file its administrative complaint early in the proceedings but either affirmatively seek, or fail to oppose, an administrative stay pending resolution of the preliminary injunction.⁴

The practical effect of the commission's willingness to put its own proceedings on hold was that federal District Courts cast the deciding vote on merger challenges—just as they do with Justice Department challenges. If the FTC lost its preliminary injunction motion, the merger was typically consummated, and the commission usually abandoned its Part 3 challenge.⁵ In *Inova*, the commission broke with this prior procedural practice. In doing so, it successfully wrested the substantive merger review away from the federal District Court. The commission's tactical actions in *Inova* are reflected in the proposed overhaul of its rules for Part 3. There is, thus, every reason to believe that the commission will push to limit District Court review in future cases; merging parties who face a commission challenge should expect the FTC to make a concerted effort to litigate the challenge before Part 3.⁶

HOW MIGHT MERGING PARTIES RESPOND TO THE COMMISSION'S APPROACH?

Whether the commission's new procedural strategy can succeed depends largely on the buy-in of another important actor: federal District Court judges. In *Inova*, the commission prevailed because it convinced the court to accept a deferential standard for review of FTC preliminary injunction requests.⁷ The commission's ability to repeat this success

³ 17 F. Supp. 2d 937 (E.D. Mo. 1998), *rev'd*, 186 F.3d 1045 (8th Cir. 1999). Similarly, in *FTC v. Butterworth Health Corp.*, the commission litigated a five-day preliminary injunction hearing with live witnesses prior to administrative complaint filing. 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (unpublished opinion). *See also* *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998) (granting FTC injunction prior to issuance of administrative complaint).

⁴ For example, in *Whole Foods*, the FTC filed its administrative complaint three weeks after its preliminary injunction motion and the commission exercised its discretion to stay the proceedings shortly after the respondents filed their answers. *See* Order Staying Administrative Proceedings, *In re Whole Foods Market, Inc. et al.*, No. 9324 (F.T.C. Aug. 7, 2007).

⁵ *See, e.g.*, Press Release, Federal Trade Commission, FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), available at <http://www.ftc.gov/opa/2005/06/archcoal.shtm>; Press Release, Federal Trade Commission, FTC Ends Administrative Litigation in Western Refining Case (October 3, 2007), available at <http://www.ftc.gov/opa/2007/10/western.shtm>.

⁶ Affirming that it intends to make the *Inova* procedural approach the new norm, the commission has simultaneously filed federal court and Part 3 complaints in its recent challenge in *In re Red Sky Holdings, LP* and notified the District Court that it intends to commence a full administrative trial only three months from the date of complaint filing. *See* Complaint ¶ 3, *F.T.C. v. Red Sky Holdings LP*, No. 4:08-cv-03147 (S.D. Tex. Oct. 23, 2008), available at <http://www.ftc.gov/os/caselist/0810170/081023redskycmpttro.pdf>.

⁷ *See* Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). In denying *Inova's* request for a three-day evidentiary hearing with live witnesses, the court noted that the "defendant's motion here . . . is an invitation for me to get involved in trying this case" and "[t]his case needs to be tried before the Commission." Transcript of Hearing at 12, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 30, 2008).

will likely depend on whether or not it can convince future District Court judges to adopt a similarly deferential standard and forgo an extensive evidentiary hearing.⁸

In response, merging parties may want to develop substantially the need for a fuller evidentiary hearing prior to a District Court accepting the FTC's truncated showing. In *Inova*, the FTC accepted that some type of evidentiary showing was necessary before the District Court could grant the preliminary injunction. Merging parties will need to marshal carefully the reasons and basis for asking a District Court to conduct something more than a cursory review of the FTC's preliminary injunction request.⁹ If the District Court agrees and authorizes the type of expansive hearing conducted in *Tenet Health Care* or *Whole Foods*, the FTC's ability to wrest substantive merger review from federal courts could be significantly compromised.¹⁰

Additionally, merging parties may want to develop approaches that hold the commission to its promise of an expedited hearing. In *Inova*, the FTC appointed one of its commissioners as a mechanism for moving the case forward expeditiously. That is probably not a practical solution for future matters. Merging parties, however, should be prepared to show the District Court why a preliminary injunction pending an administrative proceeding is not a reasonable order.

One immediate practical implication of the commission's approach is a likely significant extension of the time it takes for parties to get a final answer on their merger. For example, the agency's new proposed Part 3 rules envision a five-month complaint-to-initial-hearing timetable but put no time limits whatsoever on the period between initial decision and final commission order. In *Inova*, the likely delay (and perhaps the reduced likelihood of prevailing) led the parties to abandon their transaction.

CONCLUSION

The *Inova* case signals a new procedural approach in FTC merger challenges; merging parties facing the prospect of commission action should be prepared to defend against a commission attempt to litigate the case before Part 3. For a more detailed treatment of the *Inova* case and its implications, please read "[FTC v. Inova: A Preview of the FTC's New Plan for Merger Review?](#)," which was authored by Akin Gump Strauss Hauer & Feld LLP lawyers Mark J. Botti and David E. Altschuler and which appeared in the October 2008 issue of the ABA's *Antitrust Health Care Chronicle*.

⁸ The standard for granting a commission preliminary injunction is one that has been in dispute for a number of years and is currently in play as a result of the D.C. Circuit's recent decision in *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008). The D.C. Circuit's opinion does not clearly resolve the issue, despite the commission's claims that it does. Compare *id.* at 875-76 (observing that the FTC was not required to "prove the merits" of its case to the District Court and that "Section 53(b) injunctions are meant to be readily available to preserve the status quo while the FTC develops its ultimate case . . .") with *id.* at 876 (cautioning against District Courts applying a "rubber-stamp" to injunction requests "whenever the FTC provides some threshold evidence").

⁹ In the *Whole Foods* decision, the D.C. Circuit instructed District Courts to "exercise independent judgment about the questions § 53(b) commits to it" and "evaluate the FTC's chance of success on the basis of all the evidence before it, from the defendants as well as from the FTC." 533 F.3d at 876.

¹⁰ For example, in *Whole Foods* itself, the District Court conducted a two-day hearing with live expert testimony and reviewed 22 deposition transcripts, 13 witness transcripts from FTC investigational hearings, 16 fact witness declarations, voluminous briefing and over 1,500 exhibits. See *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 4 (D.D.C. 2007).

For more information on the commission's new proposed rules for Part 3 and their implications for merger litigation, please join Akin Gump partner C. Fairley Spillman, who will be participating as a panelist on a Strafford teleconference titled, "[New Amendments to FTC Rules of Practice: Devising Procedural Strategies for Merger Litigation](#)." The program will take place on Wednesday, December 17 from 1:00-2:30 p.m. EST.

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