

Justice Department Starts Complying with Tunney Act Procedures for HSR Act Settlements

AntitrustConnect Blog

April 30, 2016

Jeffrey May (Wolters Kluwer)

Please refer to this post as: Jeffrey May, 'Justice Department Starts Complying with Tunney Act Procedures for HSR Act Settlements', AntitrustConnect Blog, April 30 2016,

<http://antitrustconnect.com/2016/04/30/justice-department-starts-complying-with-tunney-act-procedures-in-hsr-cases/>

A long-running Department of Justice practice of avoiding Tunney Act procedures when seeking federal district court approval of civil penalty settlements in enforcement actions alleging Hart-Scott-Rodino (HSR) Act premerger notification violations is apparently coming to an end. This past week, the Justice Department published proposed final judgments and the related competitive impact statements for public comment in two pending HSR actions. The change is the result of a February decision of the federal district court in Washington, D.C., refusing to approve an HSR settlement with billionaire businessman Len Blavatnik because the government did not comply with the Tunney Act.

For decades, the Justice Department has not followed the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act, for HSR Act settlements that included only civil penalties. These formalities, however, have been followed when the government has imposed conduct restrictions or requirements in addition to civil penalties. These cases involved allegations of filing violations, as well as premerger coordination or gun-jumping. For instance, in a 2003 case against Gemstar-TV Guide International, Inc. and TV Guide, Inc., the settlement required the defendants to not only pay a \$5.67 million in civil penalties (a record at the time), but also to refrain from the challenged conduct in the future (2003-2 Trade

Cases ¶174,082).

It appears that it was not always the Justice Department's view that Tunney Act procedures were not required for civil penalty HSR settlements. The Justice Department followed Tunney Act procedures in an early HSR case that only included civil penalties. In August 1984, the government filed suit against Coastal Corporation—a Texas-based oil and gas company—for allegedly violating the premerger notification provisions of the HSR Act. The Justice Department filed a proposed consent decree requiring the defendant to pay a civil penalty of \$230,000. In announcing the complaint and settlement, the government said that it was filing a competitive impact statement regarding the proposed decree in accordance with the procedures of the Antitrust Procedures and Penalties Act. The consent decree was approved by the court in November 1984 (1985-1 Trade Cases ¶166,425).

By 1988, the Justice Department was taking the position that Tunney Act procedures were not required. On March 22, 1988, three civil lawsuits charging HSR violations were announced. The cases were against Wickes Companies, Inc., First City Financial Corp., Ltd., and Donald J. Trump, and all involved stock purchases made on behalf of the defendants through the brokerage firm of Bear, Stearns & Co. In announcing the complaints and settlements, the government said that it had asked the court to approve the decree without inviting public comment on their terms. Shortly thereafter, the consent decrees were approved (1988-1 Trade Cases ¶167,966; 1988-1 Trade Cases ¶167,967; 1988-1 Trade Cases ¶167,968).

Blavatnik case. In October 2015, the Antitrust Division, at the request of the Federal Trade Commission, filed an HSR suit in the federal district court in Washington, D.C., against Len Blavatnik. The government alleged that Blavatnik violated the premerger notification and waiting period requirements of the HSR Act when he acquired voting securities of TangoMe Inc. in August 2014. At the same time, the Justice Department filed a proposed settlement, requiring Blavatnik to pay a \$656,000 civil penalty to resolve the allegations. The Justice Department sought court approval; however, in February, the court denied approval on the ground that the Tunney Act procedures were not followed.

The Tunney Act applies to “[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws.” The government had unsuccessfully

argued that the settlement with Blavatnik was not subject to Tunney Act procedures because an HSR Act settlement solely for a civil penalty was not a “proposed consent judgment” within the meaning of the Act.

The plain language of the Act required its application to monetary antitrust settlements, according to the district court. A proposed judgment for civil penalties entered pursuant to a settlement between the parties was a “consent judgment” within the meaning of the Tunney Act, the court held.

The government argued that the phrase “consent judgment” referred solely to settlements invoking the equitable—or injunctive—power of the courts. However, the Tunney Act applied to HSR Act settlements for monetary penalties, as well as injunctive relief. “[T]he district courts’ practice of entering consent judgments for civil penalties without applying Tunney Act procedures says little, if anything, about whether that practice is consistent with the statute,” the court explained.

On April 26, the government published the consent decree, the competitive impact statement, and its request for public comment in the case. The filing starts the clock running on the 60-day public comment period. Once the comment period closes, the government can move again for entry of the Blavatnik settlement.

Leucadia National Corporation case. In an action against holding company Leucadia National Corporation, the government alleged that Leucadia’s unreported acquisition of more than 16 million shares of KCG Holdings, Inc. voting securities in July 2013 violated the HSR Act. Leucadia agreed to pay a \$240,000 civil penalty to settle the charges under a settlement announced in September 2015. At that time, the government moved for immediate entry of the settlement, without following Tunney Act procedures. A competitive impact statement has now been filed in that case to comply with the Tunney Act, as well.

Impact on future cases. Since nearly all of the HSR Act cases are filed in the federal district court in Washington, D.C., the Justice Department will likely continue to follow Tunney Act procedures in these cases going forward. In the event a case was filed elsewhere, that court might find the recent decision persuasive and require compliance. Consequently, quick resolution of HSR Act cases will no longer be the norm. That means more uncertainty for those facing government allegations of premerger notification filing violations. However, ultimately, the settlements will likely face little opposition and will be approved

following compliance with the Tunney Act procedures.