

First Supplement to Memorandum 2023-27

Antitrust Law: Presentation

Professor Ausra Deluard made a slide presentation to the Commission at the May 18, 2023, meeting, discussing mergers. Professor Deluard gave permission to reproduce her slides. They are attached.

Respectfully submitted,

Brian Hebert
Executive Director

Antitrust: Mergers

CALIFORNIA LAW REVISION
COMMISSION

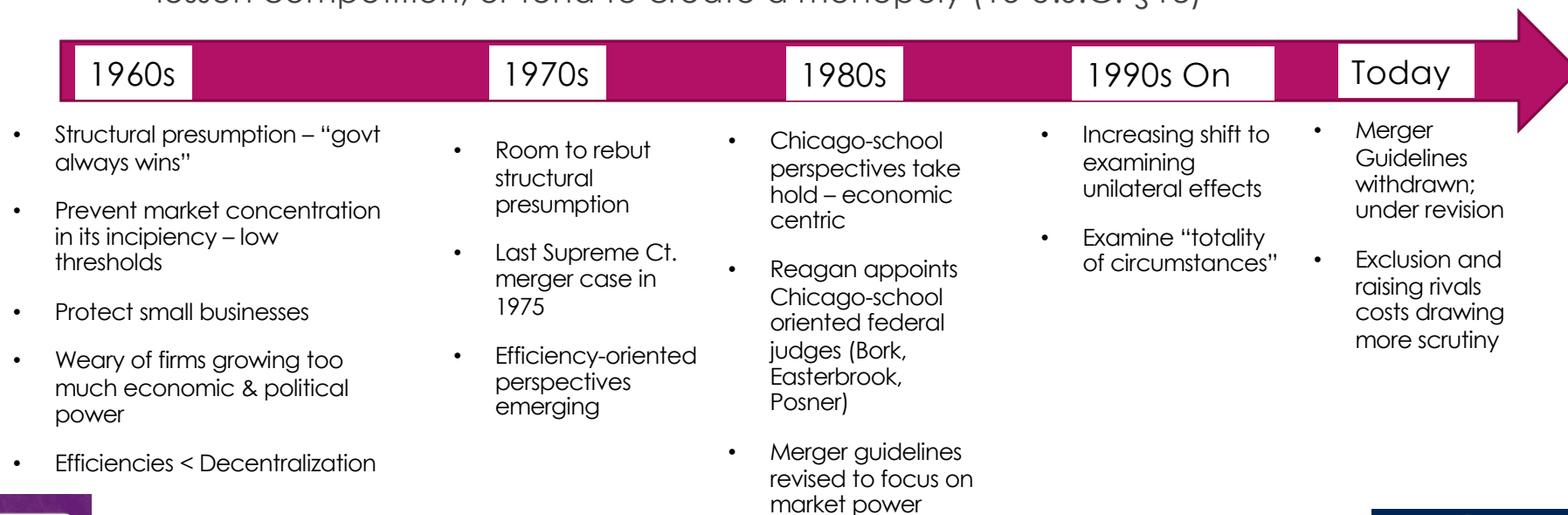
AUSRA O. DELUARD

MAY 18, 2022



(Modern) History Lesson

- ▶ Clayton Act amended (1950) to prohibit acquisitions that *may* substantially lessen competition, or tend to create a monopoly (15 U.S.C. §18)



Pre-merger Notification: HSR Act

Hart-Scott-Rodino Antitrust Improvements Act of 1976

- ▶ Compulsory pre-merger notification for transactions valued above threshold
 - ▶ Transactions valued <\$111.4 million (adjusted each year) are not reportable, but can still be investigated
 - ▶ FTC and DOJ can review and challenge closed transactions, even if they were previously reported and investigated
- ▶ Imposes 30-day waiting period, unless extended by a “Second Request” investigation
 - ▶ A “Second Request” is a burdensome subpoena that extends the waiting period to 30 days after substantial compliance
 - ▶ DOJ and FTC negotiate timing extensions in return for narrowing the scope of the investigation
 - ▶ “Second Request” compliance typically takes several months and involves hundreds of thousands of documents (if not millions)
- ▶ Failure to report or closing prematurely can result in fines >\$50,000/day
- ▶ Filing fees range from \$30,000 to \$2.25 million depending on size of transaction

Pre-merger Notification - CA



California Health Care Quality & Affordability Act (HCQAA) – effective April 1, 2024

- ▶ Office of Health Care Affordability (OHCA) established – investigate consolidation among health care entities with broad investigatory authority
- ▶ 90-day written notice to OHCA
- ▶ OHCA may conduct “cost and market impact review” - transaction cannot proceed unless OHCA issues waiver or final report
 - ▶ May contract with experts/consultants
 - ▶ Issues a publicly available preliminary report for comment before final report
 - ▶ Refers finding to AG
- ▶ Health care entity must reimburse OHCA for costs incurred during review process

Merger Review - CA

AG has existing authority to review non-profit acquisitions (Cal. Corp. Code §§5914, 5920)

- ▶ Conditional approval granted in Cedars-Sinai/Huntington; Acadia/Adventist; USC Health System/Methodist Hospital of Southern CA
 - ▶ Prohibition on anticompetitive contracting practices (bundling/"all-or nothing"); cannot interfere with payer benefit designs that reward providers for affordability [10yrs (+3)]
 - ▶ Price cap: annual prices increases cannot >4.8%/yr [5yrs (+3)]
 - ▶ Monitor & reporting for 10 years (+3)
 - ▶ Participation in Medicare & Medicaid
 - ▶ Maintain services and investments, continue capital improvements



State and Federal Merger Review

- ▶ State AGs often investigate transactions with DOJ & FTC (Waiver requests)
- ▶ States can independently challenge transactions on behalf of their citizens (Parens Patriae)
 - ▶ Summit/Sutter (1999)
 - ▶ Valero Energy Corp.
 - ▶ Bayer Monsanto
 - ▶ Anthem/Cigna
 - ▶ T-Mobile/Sprint

EU & Member States Model

European Commission reviews larger mergers with an EU dimension



Referral mechanism allows Member States and Commission to transfer cases to most appropriate authority – “one-stop-shop review”

Substantive Merger Review

Merger Guidelines Reform

2010 Horizontal Merger Guidelines



FTC and DOJ launched inquiry to strengthen merger enforcement against harms:



Evolving Issues

- ▶ Potential and nascent competition
- ▶ Serial acquirers
- ▶ Non-price competition
- ▶ Buyer power
- ▶ Zero-priced products
- ▶ Multi-sided markets
- ▶ Data aggregation

