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**Preliminary Injunctive Relief—
Non-Merger Cases Beware?**

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I. INTRODUCTION

Preliminary injunctions (“PIs”) in antitrust cases are sought most frequently—almost exclusively in fact—in the merger context. Perhaps this is because, to some degree, the fate of such motions is often outcome determinative. Namely, if the Government’s PI motion is granted, that often results in the abandonment of a deal, and vice versa. Even though a District Court may be working with a limited record in a highly fact specific inquiry, both parties are willing to accept the associated risks so that a conclusion can be reached sooner.

Some have argued that the evidentiary hurdle the Department of Justice (“DOJ”) must clear to obtain a PI in a merger case is higher than the Federal Trade Commission’s (“FTC’s”) hurdle. In *Whole Foods Market*, the D.C. Circuit suggested that pursuant to Section 15(b) of the FTC Act, the FTC could seek a PI pursuant to a “more lenient rule” in which “a unique public interest standard . . . rather than the more stringent, traditional equity standard for injunctive relief” is applied.² Regardless of whether this is true or not, it seems undisputed that PIs, whether sought by the FTC or DOJ, are an effective tool to address the time sensitivity associated with merger challenges. The cases come out both ways, with unique facts driving each outcome.

Yet, in cases between private parties in the non-merger context, PI motions seem infrequent, and cases in which they are granted appear even rarer. This is despite the fact the same general questions are applied in both contexts:

1. Has the party seeking the injunction shown a substantial likelihood of success on the merits?
2. Is there is a substantial threat of irreparable injury in absence of the injunction?
3. Do the balance of harms favor the party seeking the injunction? and
4. Would entry of the injunction serve the public interest?

The following discussion suggests that a primary factor driving this outcome is the sacrifice a damage-seeking plaintiff must make in seeking such relief. The private plaintiff must show that its threatened loss cannot be fully quantified by a future damages award. This is because “[a] prerequisite to a preliminary injunction, as to other forms of equitable relief, is a showing that the plaintiff’s remedy at law is inadequate.”³ Thus, to some extent, a PI seeking plaintiff is forced to admit that at least some of the damage it will sustain cannot be tied to a monetary award without undue speculation.

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² *FTC v. Whole Foods Mkt.*, 548 F. 3d 1028, 1043 (D.C. Cir. 2008).

³ *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 171 (7th Cir. 1988) (Posner, J.).

II. ILLUSTRATIVE CASES

A good example is provided by *Early Ford Tractor v. Hesston*, in which the Plaintiff's PI motion was granted.⁴ In *Hesston*, the plaintiff-distributor of the defendant's agricultural products brought a motion for a PI when Hesston threatened to terminate its distribution agreements if Early Ford refused to carry its new line of tractor products. Early Ford was a long time customer of Hesston's other dominant product lines, and alleged that it was the victim of an attempted tie in which the defendant forced it to carry the new line or else lose access to other products. The court found this to be an easy case in which the plaintiff could show a substantial likelihood of success on the merits,⁵ but the court still commented:

[I]n the present case, it might be surmised that treble damages would adequately compensate plaintiff, and would serve in effect as liquidated damages for good will loss, servicing problems, and the like. But plaintiff has satisfied the Court that certain losses would occur that probably cannot be established satisfactorily for recovery as damages . . . In this case, as in some others, the Court might speculate that its granting of a preliminary injunction may ultimately redound to defendant's favor, in that treble damages might ultimately prove to be stronger medicine than an injunction. But certain inadequacies of the legal remedy being apparent, it cannot be ruled with any assurance that the ultimate legal remedy would be adequate.⁶

It seems odd that a plaintiff would have to "satisf[y]" the Court that "certain losses would occur that probably cannot be established satisfactorily for recovery as damages." The Court even notes that the granting of this relief may ultimately benefit the defendant. In as many words, the Court seems to be suggesting to the plaintiff: "you asked for it, you got it."

In *Kowalski v. Chicago Tribune*, Judge Posner echoed the point that a plaintiff must show that its remedy at law is inadequate to secure preliminary relief.⁷ The panel found that the plaintiff's right to pursue damages at arbitration was an adequate remedy for the alleged termination of a distributorship contract. In affirming the denial of a PI, Posner states: "The strength of a plaintiff's case does not change the requirement of showing that the remedy at law (damages) is inadequate; one could have an open-and-shut case on the merits, yet if one's legal remedy were adequate one would not be entitled to a preliminary (or any) injunction."⁸ Posner, and most other judges, appear to veer toward a view that a final monetary award is what a private plaintiff ought to be seeking. This is especially so if the plaintiff's allegations are premised upon the breach of a negotiated agreement, as was the case in *Kowalski*.

In another example, the Seventh Circuit rejected a plaintiff-doctor's claim that a PI was needed in order to avoid being "stigmatized" and losing good will in the medical community. In *Dos Santos v. Columbus-Cuneo-Cabrini Med. Center*,⁹ the plaintiff alleged that an illegal exclusive contract between the defendant medical center and a medical group irreparably injured his

⁴ *Earley Ford Tractor, Inc. v. Hesston Corp.*, 556 F. Supp. 544 (W.D. Mo. 1983).

⁵ *Id.* at 546-47.

⁶ *Id.* at 548.

⁷ *Kowalski*, 854 F.2d at 171 (7th Cir. 1988).

⁸ *Id.* at 172-73.

⁹ *Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr.*, 684 F.2d 1346 (7th Cir. 1982).

ability to practice anesthesiology. In assessing the plaintiff's claim of lost reputation, the Seventh Circuit first suggested, based on Supreme Court precedent, that such damage was insufficient to warrant a PI.¹⁰ The Court then found that, in any case, the PI would not address the damage that the plaintiff had sustained. Specifically, the plaintiff had been fired by the exclusive anesthesiology provider, and thus the damage was not from the exclusive agreement itself, but rather the termination actions of the employer. This was despite the District Court's finding that because of the exclusive contract, competing anesthesiologists (such as the plaintiff, post-termination) were foreclosed from providing any services at all.¹¹ Again, the Court seems to suggest that a monetary award would "fit the plaintiff's needs" better than the proposed injunction.

After explaining why it was reversing the District Court's grant of a PI, the *De Santos* Court also spelled out another prominent reason why a private plaintiff may veer against moving for preliminary relief: it gives the defense a preview of the plaintiff's affirmative case, and the defense may be able to convince the Court, on an undeveloped record, that there are vulnerabilities in the arguments.

For example, the *De Santos* court directed the district court that "[s]hould the instant case proceed to trial, the [] court should reconsider on the basis of more complete evidence its preliminary finding regarding the relevant market."¹² In as many words, the Appeals Court suggested that the plaintiff's argument had serious weakness, and that "[i]f the hospital rather than the individual patient is regarded as the purchaser . . . [s]uch a recharacterization of the economic relationships could therefore alter dramatically the definition of the relevant market and with it the lawfulness of the exclusive contract."¹³ Although these findings were made in the course of an appeal, it is not difficult to see a District Court making such statements in the first instance.

III. DETERMINING THAT PRELIMINARY RELIEF IS THE BEST OPTION

A. Understanding the Differences Between Merger and Non-merger Contexts

There appear to be two key differences between PIs in the merger and non-merger contexts: (1) the potential conflict with the plaintiff's ability to seek monetary damages later, and (2) the vulnerability a plaintiff faces when articulating an affirmative case without the benefit of a full record. As to (1), at least one court has suggested that "in an action for money damages, the district court does not have the power to issue a preliminary injunction . . . [and] [f]ederal courts have the inherent equitable power to issue a preliminary injunction only when it is necessary to protect a movant's entitlement to a final equitable remedy."¹⁴

And regarding (2), because assessing the competitive effects of a proposed merger is a necessarily predictive analysis, the Government may not feel as much pressure to find the

¹⁰ *Id.* at 1349-50.

¹¹ *Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr.*, No. 81-4296, 1981 WL 2180 at *4 (N.D. Ill. Oct. 14, 1981).

¹² *Dos Santos*, 684 F.2d at 1354.

¹³ *Id.*

¹⁴ *Plant Oil Powered Diesel Fuel Sys. v. ExxonMobil Corp.*, 778 F. Supp. 2d 1180, 1190 (D.N.M. 2011) (citations omitted).

proverbial “smoking gun” document to build its case around. In contrast, the private plaintiff’s case may go from weak to strong by tailoring its specific theories around documents produced in discovery. Further, a private plaintiff faces substantial risk that if PI is denied, and even if it discovers evidence in discovery that rebuts the Court’s initial findings, it may be difficult to turn the tide.

B. Cases Where Preliminary Relief May Be Considered

Accordingly, query the cases in which a private plaintiff’s best option is still to seek preliminary relief. It may be the case in which monetary damages, if sought at all, are a distant second priority to preventing or stopping the alleged conduct. This could be because the defendant’s accused conduct is coming at a time when, if not stopped, it would create substantial barriers to entry that would thwart competitive entry for many years. (As the government may argue in a merger case.) In such a case, even if a plaintiff is able to secure treble damages years later, there is little certainty that, at that time, a competitive environment will emerge.

It may be the case that even a damage award in the millions of dollars would pale in comparison to the output and innovation increases which would have occurred had the alleged acts been stopped in their incipiency. In other words, the plaintiff is the agent for significant change in (or the eradication of) the relevant market.

Thus, the ideal PI seeking private plaintiff would seem to embody the public interest more than a private one. This may be true with respect to every private plaintiff that must show antitrust injury, but it appears that seeking a PI faces a unique set of circumstances, including an implicit admission that at least some of the sought damages are speculative. While one may doubt the existence of such private plaintiffs, perhaps they are just as likely as those daring entrepreneurs who seek to fundamentally change a given market. Rather than being the potential victim of “you want it, you got it” treatment, it is the plaintiff who says “trust me, I want it.”

Such a plaintiff may include one who is confident in its ability to quantify damages at a later date, rather than at the outset of a case. Another possibility could include a plaintiff seeking a partnership or merger with a third party, which would be forever lost absent the preliminary relief. Or last, but not least, a plaintiff who claims that some public issue, *e.g.*, consumer safety or privacy, would be permanently sacrificed if preliminary relief were not granted.