

# LEGAL DEVELOPMENTS

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## AVH Victory Against Antitrust Division Shows That Challenges to Mergers Can Be Litigated Quickly and Defended Successfully

### Antitrust Division's First Merger Case Loss in Washington, D.C. in Ten Years

AVH has completed the successful defense of SunGard Data Systems Inc.'s ("SunGard") acquisition of certain assets of Comdisco, Inc. ("Comdisco"). The Antitrust Division of the Department of Justice ("DOJ") sued SunGard and Comdisco in federal district court in Washington, D.C., seeking an injunction permanently enjoining SunGard from acquiring Comdisco's Availability Solutions business. DOJ and AVH (with assistance from lawyers from White & Case) litigated a two-day trial on the merits just ten weeks after the filing of the parties' Hart-Scott-Rodino forms and 17 days after the filing of DOJ's complaint. On November 14, 2001, Judge Ellen Huvelle dismissed DOJ's complaint with prejudice. DOJ decided not to pursue an appeal, marking DOJ's first merger case loss in Washington, D.C. in ten years. SunGard consummated the acquisition of Comdisco's Availability Solutions business on November 15, 2001.

The case, *United States of America v. SunGard Data Systems Inc. and Comdisco, Inc.*, 172 F. Supp.2d 172 (D.D.C. 2001), is noteworthy for two important reasons. First, it demonstrates that the decision of DOJ (or the FTC) to oppose a merger need not be fatal. Second, it

demonstrates that the time it takes to litigate a merger challenge need not be so lengthy that the merging parties cannot complete the deal.

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When DOJ filed its complaint on October 22, business needs mandated that SunGard have a resolution to the antitrust case within six weeks. AVH successfully moved to expedite the litigation schedule. The scheduling order condensed discovery—normally a months-long process—into ten days. Third-party subpoenas were issued, protective order conflicts resolved and documents reviewed. SunGard and DOJ conducted three expert depositions and nine fact-witness depositions. The parties prepared and exchanged expert reports and exhibit lists. Briefs on the merits, findings of fact and conclusions of law were filed with Judge Huvelle on the final days before the hearing. Indeed, DOJ filed its reply papers on the morning of the first hearing.

On November 8, Judge Huvelle held a ten-hour evidentiary hearing. The hearing was limited to cross examination of SunGard's two expert witnesses and DOJ's one expert witness. The next day, Judge Huvelle heard closing

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Axinn, Veltrop & Harkrider LLP practices in the areas of antitrust and trade regulation, intellectual property and complex commercial litigation. The firm provides ongoing advice and services to Fortune 500 clients in the antitrust aspects of M&A transactions. The firm also counsels clients in a wide range of other areas, including deceptive acts and practices, health care, consumer protection, employment law and various regulatory areas.

arguments from both sides and agreed to issue a ruling within five days, before SunGard's business deadline.

Judge Huvelle's 36-page decision concluded that DOJ failed to prove a proper relevant market, concluding that SunGard successfully demonstrated that large numbers of consumers within the purported relevant market had other options. Judge Huvelle rejected the government's "overly narrow and static" product market definition, concluding that the conflicting evidence and broad diversity of SunGard's and Comdisco's customer base did not support any generalizations about customer behavior, and denied DOJ's request for an injunction.

#### Lessons Learned

*Mergers Can Be Completed Over the Objection of the DOJ and FTC.* DOJ was staunchly opposed to SunGard's acquisition of Comdisco. DOJ took every step to dissuade the parties from going forward. Nonetheless, SunGard was able to complete the acquisition because it committed itself to litigating the case to the

end. The conventional wisdom is that merger parties never prevail in court, and it is true that DOJ and the FTC rarely lose. This case, however, shows that parties willing to put DOJ to the test have a reasonable chance of success.

*Even time-sensitive deals may be litigated and completed.* One reason that many deals are terminated after DOJ brings suit is that the distraction to the business of the parties is too great to withstand the stress and strain of a trial over several months. What *SunGard* shows is that effective counsel can litigate a DOJ challenge quickly enough so that the merger parties can hold the deal together during the trial. Thus, if the parties successfully defeat the DOJ's suit, the acquisition can be consummated. Judge Huvelle granted the motion for an expedited litigation schedule because SunGard effectively communicated the importance of obtaining a final resolution by the business deadlines. By educating a judge about the business realities surrounding a deal and the business impact of failing to expedite a case's resolution, it is possible to complete a litigation quickly enough to hold the transaction together.