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Robert B. Greenbaum

Alan Meese
William & Mary Law School, ajmees@wm.edu

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RESPONSE

Premerger Review and Bankruptcy: The Meaning of Section 363(b)(2)

by Robert B. Greenbaum and Alan J. Meese

Section 363(b)(2) of the Bankruptcy Code alters the practice under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) when a party acquires assets of a bankrupt estate. Section 363(b)(2) provides that "notwithstanding subsection (b) of [the HSR Act], the required waiting period" shall last ten days after notification of the government "unless the court, after notice and hearing, orders otherwise." 11 U.S.C. § 363(b)(2)(B). James Spears, FTC General Counsel, has argued in this magazine [Spring 1992, at 19] that this provision simply shortens the initial component of the HSR Act waiting period, that is, the ordinary 30-day delay that ensues upon notification of the government. Under this approach, 363(b)(2) has no effect on the second component of the waiting period, namely, the delay that ensues upon issuance of a second request.

Mr. Spears' position is consistent with that of the Federal Trade Commission.[1] Indeed, in one case in which the authors were involved, the Commission went so far as to issue a second request without notifying the bankruptcy court supervising the estate in question.[2] The Department of Justice apparently takes a different position, i.e., that Section 363(b)(2) modifies the entire HSR Act waiting period, with the result that only the bankruptcy court can extend the waiting period.[3] Senate bill 540, introduced earlier this year, would clarify the statute's meaning.

According to Mr. Spears, the language of Section 363(b)(2) does not resolve the matter, making it necessary to resort to other methods of interpretation. Such an inquiry, he asserts, compels a conclusion that Section 363(b)(2) leaves the government free to delay an acquisition via issuance of a second request. We disagree. The ordinary meaning of Section 363(b)(2) requires the conclusion that the statute supplants the initial component of the HSR Act waiting period as well as the delay that ensues upon issuance of a second request. To delay an acquisition by more than 10 days, the government must petition the bankruptcy court.

Section 363(b)(2) of the Bankruptcy Code alters the practice under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) when a party acquires assets of a bankrupt estate. James Spears, FTC General Counsel, has argued that this provision simply shortens the initial component of the HSR Act waiting period. . . .

Mr. Spears' position and that of the Commission necessarily rest on the assumption that the HSR Act contains two distinct waiting periods: one created by subsection (b)(1), and one created by subsections (e)(1) and (2).[4] Thus, the argument continues, Section 363(b)(2) modifies only the former "waiting period," leaving the "second waiting period" intact. Under this approach, a second request prevents the consummation of an acquisition because subsections (e)(1) and (2) operate to prevent an acquisition upon issuance of a second re-

Robert B. Greenbaum is Special Counsel at Skadden, Arps, Slate, Meagher & Flom in Washington, D.C. Alan J. Meese is an associate at the firm.

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quest.[5] This reading is inconsistent with the language of the HSR Act and the Commission's rules implementing it.

The text of the Act speaks of only one waiting period. Section 7A prohibits certain acquisitions unless: (1) both parties have filed the requisite notification and (2) "the waiting period described in subsection (b)(1) of this section has expired." 15 U.S.C. 18a(a). Subsection (b)(1) provides that "the waiting period required under subsection (a)" shall last thirty days from notification (15 days in the case of a tender offer) unless the period is extended "under subsection (e)(2) or (g)(2)." 15 U.S.C. 18a(b)(1)(B). The language of the statute reveals no second waiting period. Instead, Subsection (b)(1) creates a single thirty day period that can be extended upon the issuance of a second request.

The Commission's own rules confirm this reading. 16 C.F.R. § 803.20(c), entitled "Waiting Period Extended" provides that, on issuance of a second request, "the waiting period shall remain in effect, even though the waiting period would have expired, (see § 803.10(b)) if no such request had been made."

We assume that Congress understood the text to which it was referring as well as the interpretive gloss placed on that text by the Commission.[6] Thus, Congress must have used the phrase "required waiting period" in Section 363(b)(2) to encompass *both* the thirty-day time frame created by subsection (b)(1) *and* any extension of that period effected pursuant to subsections (e)(1), (e)(2), or (g)(2). It follows, then, that Section 363(b)(2) both supplants the thirty-day interval created by HSR Act subsection (b)(1) and divests the government of its usual authority to extend that period as contemplated by the same subsection.

The necessity of this result becomes even more compelling when one considers the implications of the Commission's approach for the operation of the HSR Act itself. Subsection (a) forestalls any acquisition before "the waiting period described in subsection (b)(1) of this section has expired." 15 U.S.C. § 18a(a). The Commission's approach, that is, reading a reference to "the waiting period" to apply only to the thirty-day interval explicitly mentioned in subsection (b)(1) itself, and not to any extensions of it, requires a conclusion that subsection (a) only prevents those acquisitions that would take place before the initial thirty-day interval expires. Because subsections (e)(1) and (e)(2) do not themselves prevent acquisitions, but only operate to extend the thirty day interval of subsection (b)(1),[7] the Commission's approach would render a second request powerless to prevent an acquisition.

The ordinary meaning of Section 363(b)(2) requires the conclusion that the statute supplants the initial component of the HSR Act waiting period as well as the delay that ensues upon issuance of a second request.

In light of the statute's ordinary meaning, Mr. Spears' other arguments are unconvincing. Our reading is not an implicit repeal of subsections (e)(2) and (g)(2); repeal is quite explicit. Section 363(b)(2) refers to subsection (b) of the HSR Act. Subsection (b)(1), in turn, expressly incorporates subsections (e)(2) and (g)(2). Thus, the reference in Section 363(b)(2) to subsection (e)(2) and (g)(2) is no more or less explicit than the reference to these provisions contained in subsection (a) of the HSR Act itself.

Mr. Spears' assertion that our reading cannot be correct because it would thwart the purpose of Section 7A is equally untenable. General purposes cannot override a statute's ordinary meaning. Statutes are means, not ends, and Congress presumably chooses the means cognizant of the increasing costs of pursuing certain goals more and more vigorously. Thus, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987).

Section 363(b)(2) was obviously crafted with two competing objectives in mind: streamlining the premerger review process for bankrupt firms while preserving the government's ability to review proposed transactions. It is not likely that interpreting the Section in light of only one of these purposes will achieve Congress's intent. The best evidence of how

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Congress struck this balance is found in the language of the statute itself.

When a firm enters bankruptcy, powerful considerations militate against extended premerger review. Implementation of Section 363(b)(2)'s ordinary meaning as we propose here strikes the balance between competing interests in two ways. First, it accelerates the government's decision concerning the issuance of a second request. Second, it wisely transfers discretion over the length of any investigation from the government to the bankruptcy court. This court is more likely to possess the experience necessary to appreciate fully the exigencies of the situation. It also will be in an excellent position to evaluate the antitrust issue most likely to predominate, the application of the failing firm defense. Such discretion would not be "unbridled" as Mr. Spears claims; instead, like the discretion exercised by the government, it would be constrained by the values that call forth the delegation in the first instance.

In Mr. Spears' view, our reading would confer "broad, unchecked authority" on the bankruptcy courts of the sort not ordinarily exercised by such tribunals. He asserts that, because the authority we envision does not involve matters that arise "*only* in the context of bankruptcy proceedings" (emphasis in original), it is not authority over a "core" proceeding that can be left to the bankruptcy court. We disagree.

As an initial matter, this argument proves too much. Our reading would vest the bankruptcy court with the power over both components of the waiting period created by HSR Act subsection (b)(1). Mr. Spears' reading would merely confer authority over the first component. Neither matter is the sort that only arises in bankruptcy, except, of course, by virtue of Section 363(b)(2) itself. Thus, under Mr. Spears' approach, the Commission's reading would itself be incorrect, thereby suggesting that Mr. Spears' approach to defining "core" matters is off the mark.

Instead of asking whether the authority contemplated relates to those matters that could only arise in bankruptcy, we would ask whether vesting the authority at issue in a bankruptcy judge would implicate the sort of constitutional concerns that led Congress to draw the "core"/ "non-core" distinction. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), held that Congress could not vest non-Article III courts with the power to adjudicate traditional common law claims. Our approach would not confer on the bankruptcy court any function that Article III requires to be handled by life-tenured judges. Instead, it would transfer authority from one non-article III decision-maker, the executive branch, to another, the bankruptcy court.

Mr. Spears' argument based on the withdrawal provision of 157(d) fares no better. This argument rests on a controversial reading of 157(d) that would require withdrawal to the district court of *any* issue that involves a federal law regulating interstate commerce. As Mr. Spears concedes, some courts have instead held that Section 157(d) means what it says, i.e., mandates withdrawal only when "*both* title 11 *and* other laws of the United States regulating . . . interstate commerce" are involved. 28 U.S.C. § 157(d) (emphases added).[8] If these courts are correct, withdrawal of federal disputes is not mandatory, and Congress assumed that bankruptcy courts would be passing on issues of federal law.[9]

In addition, not all of the courts that take a nontextual approach to Section 157(d) require withdrawal *whenever* a federal statute regulating interstate commerce is involved. Instead, many courts require withdrawal only where the proceeding requires the bankruptcy court "to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes."[10]

Thus, even under the majority approach to § 157(d), it is far from clear that decisions under our reading of Section 363(b)(2) would be subject to mandatory withdrawal. At any rate, even if the interpretation of Section 157(d) offered by Mr. Spears is the correct one, all that follows is that decisions whether to extend the waiting period must be withdrawn to the district court, not that Section 363(b)(2) should be "interpreted" to provide the government with sole discretion over the review of acquisitions of wasting assets. ●

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[1] ABA ANTITRUST SECTION, PREMERGER NOTIFICATION PRACTICE MANUAL 237-38 (Bruce Prager, ed. 1991) (describing Commission's position).

[2] Transaction Identification No. 93-0453, second request issued Dec. 31, 1992 by Federal Trade Commission.

[3] "Under section 363 of the bankruptcy code, 11 U.S.C. § 363(b)(2), however, the waiting period for a transaction by a trustee expires 10 days after filing of the notification unless extended by the court." *In re* Ionosphere Clubs, Inc. and Eastern Airlines, Inc., Response of the United States of America to Motions of the Trustee for Orders Pursuant to Sections 365(a) and 365(b) of the Bankruptcy Code, at 2.

[4] *See In re* Financial News Network, Inc., Objection and Response of the Federal Trade Commission to the March 4, 1991 Motion of Financial News Network Pursuant To Bankruptcy Code §§ 363 and 365, at 3 (referring to the "normal waiting periods under Section 7A") (emphasis added).

[5] *See* Objection and Response of the Federal Trade Commission, *supra* note 4, at 6 (stating (incorrectly) that "Section 7A(e)(2) of the Clayton Act provides that when a Request for Additional Information is issued, the proposed acquisition may not be consummated until twenty days after the date on which the parties substantially comply with the Requests.")

[6] Miles v. Apex Marine Corp., 498 U.S. 19, 31 (1990)(Congress presumed to know and adopt judicial constructions of earlier statute); Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979) (same).

[7] Subsection (e)(2) explicitly requires such an extension. Although subsection (e)(1) does not explicitly so provide, the Commission has provided for such an extension by rule. *See* 16 C.F.R. § 803.30(c).

[8] *E.g.*, *In re* Adelphi Inst., Inc., 112 Bankr. 534, 536 (S.D.N.Y. 1990); Block v. Anthony Tammaro, Inc., 56 B.R. 999, 1004 (D.N.J. 1986).

[9] *See* 1 COLLIER ON BANKRUPTCY ¶ 3.01 at 3-67-68 (antitrust and HSR Act issues ought not be subject to mandatory withdrawal).

[10] City of New York v. Exxon Corp., 932 F.2d 1020, 1026 (2d Cir. 1991).

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