



Partner

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Services

Antitrust/Competition > Merger Clearance >

James A. Fishkin combines both government and private sector experience within his practice, which focuses on mergers and acquisitions covering a wide range of industries, including supermarket chains and other retailers, consumer and food product manufacturers, internet-based firms, chemical and industrial gas firms, and healthcare firms. He has been a key participant in several of the most significant litigated antitrust cases in the last two decades that have set important precedents, including representing Whole Foods Market, Inc. in *FTC v. Whole Foods Market, Inc.* and the Federal Trade Commission in *FTC v. Staples, Inc.* and *FTC v. H.J. Heinz Co.*

Mr. Fishkin has also played key roles in securing unconditional clearances for many high-profile mergers, including the merger of OfficeMax/Office Depot and Monster/HotJobs, and approval for other high-profile mergers after obtaining successful settlements, including the merger of Albertsons/Safeway. He also served as the court-appointed Divestiture Trustee on behalf of the Department of Justice in the Grupo Bimbo/Sara Lee bread merger.

Mr. Fishkin has been recognized by *Chambers USA*, *The Best Lawyers in America*, *The Legal 500*, and *Benchmark Litigation* for his antitrust work. *Chambers USA* notes that Mr. Fishkin “impresses sources with his ‘very practical perspective,’ with commentators also describing him as ‘very analytical.’” *The Legal 500* states that Mr. Fishkin “possesses excellent relationships and very good business sense.” *Benchmark Litigation* has listed Mr. Fishkin as an antitrust “litigation star” and praised his “legal analysis, strategy, and knowledge of government entities.”

Mr. Fishkin has been a speaker at industry and academic conferences, a lecturer to antitrust practitioners at CLE-approved events, and a guest law school lecturer. He has also made educational presentations to antitrust officials from the EU Merger Task Force, several European and South American countries, Japan, South Korea, Russia and the FTC.

EXPERIENCE

- Guided **Albertsons** and its parent Cerberus to a settlement with the FTC and several states that enabled Cerberus to complete its US\$9.4 billion acquisition of Safeway, the largest supermarket merger ever (measured by combined number of stores). The FTC accepted the settlement for public comment on January 27, 2015.
- Obtaining for **US Ecology, Inc.** clearance from the DOJ to acquire The Environmental Quality Co. (EQ) for US\$465 million. The DOJ cleared the transaction after a detailed review, despite competitive overlaps, without issuing a second request. US Ecology completed the acquisition in June 2014.
- Obtaining for **OfficeMax** unconditional clearance from the FTC and the Attorneys General of several states to merge with Office Depot after an eight month investigation. The FTC unanimously closed its investigation of the merger of second and third largest chains of office supply superstores on November 1, 2013 and issued a Statement of the Commission explaining its decision to clear the merger even though the FTC successfully blocked the merger of Staples and Office Depot in 1997.
- Obtaining for **Procurian**, a company owned by Internet Capital Group, clearance from the DOJ to merge with Accenture. The DOJ cleared the transaction after a detailed review, despite competitive overlaps, without issuing a second request. ICG completed the sale to Accenture in December 2013.
- Obtaining for **MWI Veterinary Supply, Inc.** clearance from the FTC to acquire the assets of IVESCO Holdings LLC. The FTC cleared the acquisition after a detailed review, despite competitive overlaps, without issuing a second request. MWI completed the acquisition in November 2013.
- Obtaining for **Airgas, Inc.** clearance from the FTC to acquire the industrial, medical and specialty gas assets and operations of The Encompass Gas Group. The FTC cleared the acquisition after a detailed review, despite competitive overlaps, without issuing a second request. Airgas completed the acquisition in October 2013.
- Serving as the **Divestiture Trustee** for *United States v. Grupo Bimbo, S.A.B. de C.V., et al.* (D.D.C.) from February 2012 to December 2013. The DOJ reached a settlement agreement with Grupo Bimbo S.A.B. de C.V., BBU, Inc., and the Sara Lee Corporation on October 21, 2011. The buyers, Grupo Bimbo and BBU, agreed to divest certain brands of sliced fresh bread and related assets to complete their acquisition of Sara Lee's North American Fresh Bakery Business. After Grupo Bimbo and BBU failed to complete certain required divestitures in the time permitted, DOJ requested Judge Emmet G. Sullivan to appoint Mr. Fishkin as DOJ Divestiture Trustee based on his "expertise" and "experience." The appointment by Judge Sullivan on February 29, 2012, vested Mr. Fishkin with the power and authority to divest certain of the parties' commercial bakery brands and assets pursuant to the settlement agreement reached in the case. As the Divestiture Trustee, Mr. Fishkin sold the Sara Lee, EarthGrains, and Mrs. Baird's brands in California, the

Oklahoma City area, and the Kansas City Area to buyers that were all approved by the Department of Justice. Mr. Fishkin also negotiated co-pack agreements between the buyers and BBU.

- Obtaining for **The Harvard Drug Group, LLC**, a portfolio company of private equity firm Court Square Capital Partners, clearance from the FTC to acquire the Rugby brand of over-the-counter (OTC) drug products from Watson Pharmaceuticals. The transaction combined Harvard's Major brand of OTC drug products with Watson's Rugby brand enabling Harvard to become one of the largest distributors of private label OTC drugs in the United States. After a thorough review, the FTC cleared the transaction without issuing a second request. Harvard completed the acquisition on October 29, 2012.
- Obtaining for **Infiltrator Systems, Inc.**, a portfolio company of private equity firm Graham Partners, clearance from the FTC to acquire the septic chamber business from Advance Drainage Systems, Inc. (ADS) and to enter into a long term distribution agreement with ADS for certain septic chamber products manufactured by Infiltrator. The FTC cleared the acquisition and long term distribution agreement, despite competitive overlaps, after a detailed review without issuing a second request. Infiltrator completed the acquisition on January 17, 2012.
- Securing FTC approval for **DNA Diagnostics Center (DDC)** to acquire Orchid Cellmark, Inc.'s government paternity testing business as part of a December 2011 FTC Consent Agreement. The FTC approved DDC as the upfront buyer in a Consent Agreement that enabled Laboratory Corporation of America to complete its US\$85.4 million acquisition of Orchid Cellmark. DDC completed its acquisition of Orchid Cellmark's government paternity testing business on December 19, 2011.
- Obtaining clearance from the DOJ for **One Equity Partner's** US\$600 million sale of Prodigy Health Group, the nation's largest independent third party administrator (TPA) of self-funded health care plans, to Aetna. The transaction received Early Termination in May 2011 despite DOJ's focus on health related antitrust issues. The transaction was completed June 28, 2011.
- Obtaining for **Dean Foods Company** clearance from the DOJ to sell its branded and private label yogurt businesses in separate transactions. After a detailed review of each transaction by DOJ due to competitive overlaps, Dean Foods Company received Early Termination in January 2011 for the sale of its Mountain High yogurt brand to General Mills, Inc. and Early Termination in March 2011 for the sale of its private label yogurt business to Schreiber Foods, Inc.
- Obtaining for **Monster Worldwide, Inc.** clearance from the FTC for its acquisition of HotJobs from Yahoo! Inc. The FTC closed its investigation in August 2010 after issuing second requests without seeking any enforcement action. A similar proposed acquisition of HotJobs by Monster, two of the largest online job boards, faced resistance from the FTC in 2001 before Yahoo! acquired HotJobs.
- Representing **Kellogg Company** in its acquisition of Wholesome & Hearty Foods' Gardenburger business. The FTC closed its investigation without seeking any enforcement action against the consummated acquisition in May 2009.
- Securing timely FTC approval for **Morton International, Inc.**, a wholly-owned subsidiary of Rohm and Haas Company, to acquire the Season-All® brand from McCormick & Co. as part of a July 2008 FTC Consent Agreement. The FTC approved Morton as the upfront buyer in a Consent Agreement that enabled McCormick to complete its US\$605 million acquisition of the Lawry's and Adolph's brands from Unilever N.V. On July 31, 2008, Morton completed its acquisition of the Season-All® business.
- Obtaining for **Airgas, Inc.** clearance from the FTC to acquire the refrigerants assets and operations of Refron, Inc. The FTC cleared the transaction, despite competitive overlaps, without issuing a second request. Airgas completed the acquisition in July 2008.

- Acting as one of the lead trial lawyers to defend **Whole Foods Market, Inc.** in a lawsuit brought by the FTC seeking to block the company's US\$565 million acquisition of Wild Oats Markets, Inc. Mr. Fishkin identified and deposed key third party witnesses, managed all aspects of third party discovery, and prepared and defended the defendants' industry expert witness whose testimony and report were quoted throughout Judge Paul L. Friedman's August 16, 2007 opinion rejecting the FTC's motion for a preliminary injunction (*FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007)). Mr. Fishkin also defended Whole Foods in the subsequent administrative litigation in 2008-09 to unwind the deal and he helped negotiate the consent agreement in 2009 with terms that were highly favorable to Whole Foods.
- Formulating a transaction structure for **Airgas, Inc.** to obtain expedited FTC review and approval of its US\$310 million acquisition of the industrial packaged gas business of Linde AG. The FTC cleared the transaction, despite competitive overlaps in numerous local areas, without issuing a second request. Airgas completed the acquisition in July 2007.
- Securing approval from the FTC for **Airgas, Inc.** to acquire the U.S. industrial bulk gas business that Linde AG was ordered to divest after its acquisition of The BOC Group. Airgas completed the US\$495 million acquisition in March 2007 after a detailed review of vertical and horizontal issues by the FTC.
- Formulating a transaction structure for **Clemens Markets, Inc.** to sell its supermarkets to Giant Foods Stores, LLC, a subsidiary of Ahold USA, and C&S Wholesale Grocers, Inc. The FTC cleared the transactions, despite competitive overlaps, without initiating a second request investigation. Clemens completed the asset sales in October 2006.
- Obtaining for **Airgas, Inc.** clearance from the FTC to acquire the industrial packaged gas assets and operations of Aeriform Corporation and Union Industrial Gas Group (UIG) in separate transactions. The FTC cleared each acquisition after separate reviews, despite competitive overlaps, without initiating a full investigation. Airgas completed the Aeriform acquisition in September 2006 and the UIG acquisition in November 2006.
- Obtaining for **Israel Chemical Ltd. (ICL)** clearance in its US\$255 million acquisition of assets and operations of Astaris LLC, a joint venture of FMC Corporation and Solutia Inc., despite competitive overlaps and prior FTC enforcement action in the relevant markets under review. ICL completed the acquisition in November 2005.
- Representing **Greenbacks, Inc.** in the sale of its 96-store chain to Dollar Tree Stores, Inc. The FTC cleared the US\$100 million sale, despite competitive overlaps, after a detailed review without initiating a second request investigation. The stock deal was completed in June 2003.

Government Experience

Prior to entering private practice in 2002, Mr. Fishkin spent 15 years at the FTC where he had a distinguished career and acquired a deep understanding of complex antitrust and litigation issues. Mr. Fishkin was the lead attorney on many high profile merger investigations, including some of the most significant antitrust matters of the period. Such investigations resulted in successful litigation, major settlements or terminated mergers.

Mr. Fishkin played key roles in several of the FTC's landmark merger trials, including *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (preliminary injunction to prevent merger with Office Depot) and *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000), rev'd, 246 F.3d 708 (D.C. Cir. 2001) (reversing district court denial of preliminary injunction to prevent merger with Beech Nut). The Staples and Heinz decisions are frequently cited by judges and scholars in opinions, leading antitrust treatises, articles, and text books for determining when a merger may substantially lessen competition in violation of the Clayton Act. These cases are also

discussed by antitrust officials for their impact on current merger law and enforcement practices. Mr. Fishkin's collective litigation and trial responsibilities included direct and cross-examination of witnesses in federal court, depositions, discovery and formulating trial strategies.

Mr. Fishkin also was the prime architect of the Commission's supermarket merger enforcement program and he managed virtually all of the major supermarket merger investigations. Some of his prominent supermarket merger enforcement matters included Winn-Dixie/Jitney-Jungle (2001), Kroger/Winn-Dixie (2000), Ahold/Pathmark (1999), Albertson's /American Stores (1999), Ahold/Giant Food (1998), Albertson's/Buttrey (1998), Jitney-Jungle/Delchamps (1997), Stop & Shop/Purity Supreme (1995) and Red Apple/Sloan's-Gristede's (1995).

Mr. Fishkin also managed or played a significant role in major investigations of mergers between food manufacturers, including General Mills/Pillsbury (2001), Heinz/Vlasic (2001) and KKR/RJR Nabisco (1989). Mr. Fishkin's tenure with the Commission also included extensive work on mergers involving a variety of other industries, including nonfood retailers, cable networks, cable systems and chemical manufacturers. He was the principal draftsman of the staff recommendation memorandum outlining the various vertical and horizontal theories in Time Warner/Turner (1996). Mr. Fishkin's experience also included consummated merger investigations, mergers before bankruptcy courts, investigations involving trade association anticompetitive practices and Hart-Scott-Rodino violation investigations which resulted in civil penalties.

Mr. Fishkin received numerous honors at the FTC, including the Distinguished Service award (2002), the Paul Rand Dixon award (2000), the Superior Service award (1996), and the Meritorious Service award (1995). Mr. Fishkin also received the Outstanding Team award (1997).

EDUCATION

- The University of Iowa, B.A., 1983, with Distinction, Phi Beta Kappa
- The University of Iowa College of Law, J.D., 1986, Note and Comment Editor of the *Iowa Law Review* and author of "Nix v. Williams: An Analysis of the Preponderance Standard for the Inevitable Discovery Exception," 70 *Iowa Law Review* 1369 (1985) (cited by an appellate court and discussed and cited in several law review articles and books)

ADMISSIONS

- District of Columbia
- Nebraska
- United States District Court for the District of Columbia

MEMBERSHIPS

- American Bar Association Antitrust Section
- Practitioner-In-Residence, University of Iowa College of Law (March 19-20, 2018)

SPEAKING ENGAGEMENTS

- **Practitioner-in-Residence, James A. Fishkin** — (March 19-20, 2018)
- **Sound Advice for the Advisor** — Canadian Bar Association Competition Law Fall Conference, Ottawa (October 1, 2015)

Speaker, panel on "best practices" in developing and maintaining an effective client relationship with respect to competition law advice.

- **Clean Up in Aisle 3 – New Approaches to Merger Review in the Retail Sector** — Global Competition Review 4th Annual Antitrust Law Leaders Forum, Miami, FL (February 6, 2015)

Speaker, panel on competition and consolidation in the retail sector, and how the rise of online sales platforms and other disruptive technologies have influenced the development of merger analysis.

- **Dealing with Tough Antitrust Issues in Conduct and Mergers: How Do Law and Scholarship Matter?** — University of Iowa Law Review Centennial Symposium, Iowa City, IA (October 24, 2014)
- **Office Superstores: What Changed in 15 Years?** — Presented by the Economics and Mergers & Acquisitions Committees of the ABA Section of Antitrust Law, Washington, D.C. (January 6, 2014)

Co-moderator, discussion on the Office Depot/Office Max matter.

- **FTC v. Staples, Inc., A Transformative Merger Case that Widely Impacts Current Merger Analysis** — University of Minnesota Law School, (January 31, 2013)
- **Antitrust: Merger Activities and FTC Enforcement** — Food Marketing Institute 2012 Legal Conference, Miami, FL (June 4, 2012)
- **FTC Merger Enforcement Update** — Food Marketing Institute Legal Affairs Committee, (March 1, 2012)
- **Merger Analysis and FTC v. Staples, Inc.** — University of Florida Levin College of Law, (January 27, 2012)
- **Antitrust Intersects with the Food & Beverage Industry** — Grocery Manufacturers Association and Food Marketing Institute Joint Legal Committee, Washington, DC (October 20, 2011)

- **Why the FTC Lost the Whole Foods/Wild Oats Case and Won the Staples/Office Depot Case** — LECG Dinner Seminar, Washington, DC (May 28, 2008)
- **FTC v. Whole Foods Market, Inc. (before the New York State Bar Association Antitrust Section)** — New York State Bar Association Antitrust Section, New York, NY (September 19, 2007)
- **Historical Review of FTC Supermarket Merger Enforcement: 1997 - 2001** — Grocery Store Antitrust: Historical Retrospective & Current Developments conference, Federal Trade Commission, Washington, DC (May 24, 2007)
- **Buying Power in the Retail Sector** — American Antitrust Institute's Fifth Annual Conference: Buyer Power and Antitrust, Washington, D.C. (June 22, 2004)