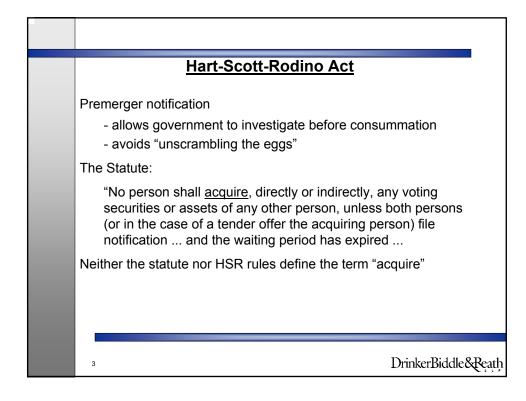
# Panel 5: Pre-Consummation Information Exchange and Integration Planning (Slides & Presentations)

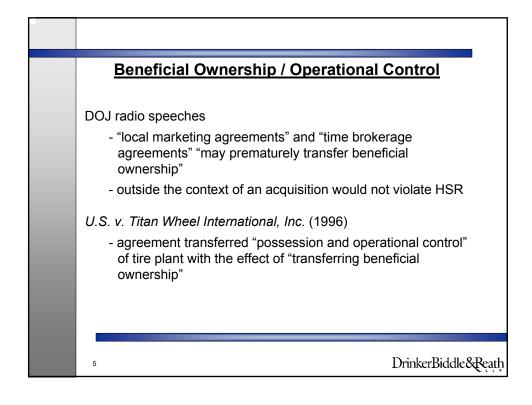
Morse	p. 2-10
Bonanto	p. 11-13
Whitener	p. 14-17

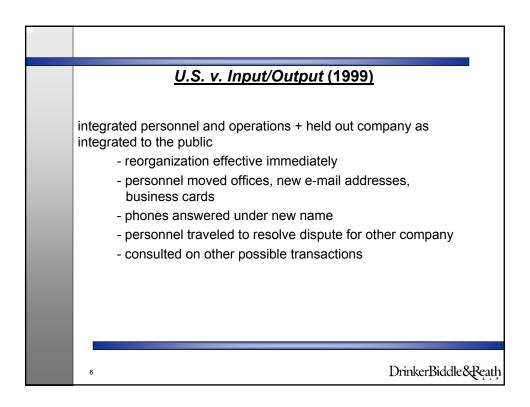


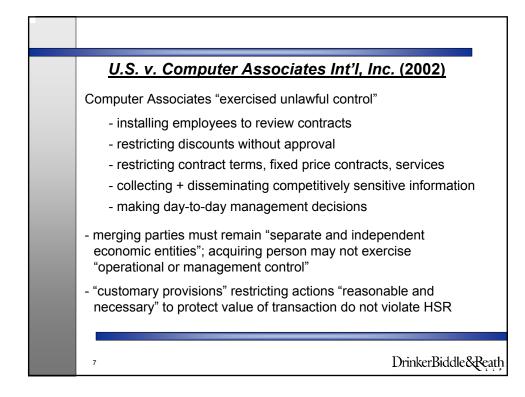
Critical Legal Distinctions
1. Gun Jumping v. Information Exchange
2. Hart-Scott-Rodino Act v. Sherman Act / FTC Act Limitations
See generally, H. Morse, <i>Mergers and Acquisitions: Antitrust Limitations on Conduct Before Closing</i> , 57 Business Lawyer 1463 (2002)
2 DrinkerBiddle&Reath



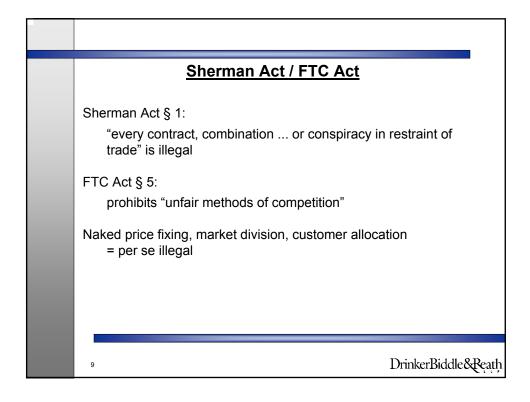
HSR Rules / Beneficial Ownership
The Rules:
"acquiring person" = person who will "hold" voting securities or assets
"hold" = "beneficial ownership"
"Statement of Basis and Purpose":
"the existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the <u>indicia of beneficial ownership</u> ," which include
- right to obtain any increase in value
- risk of loss,
- right to vote
- investment discretion
4 DrinkerBiddle&Reath



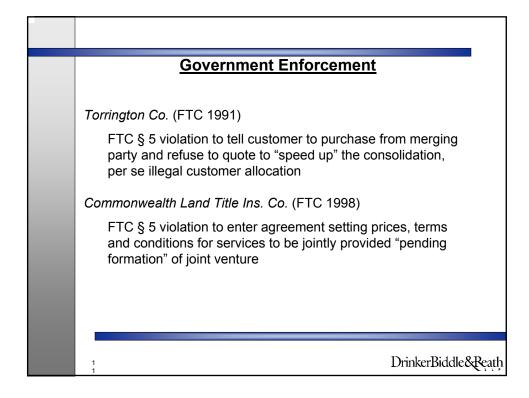


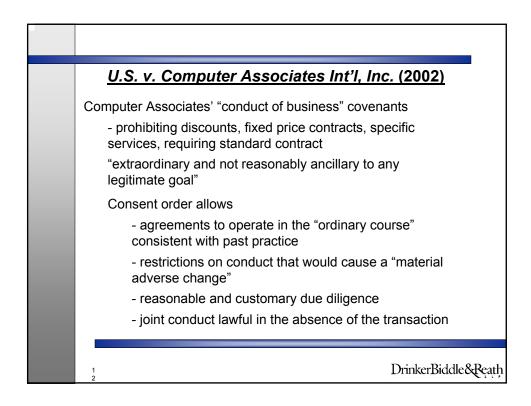


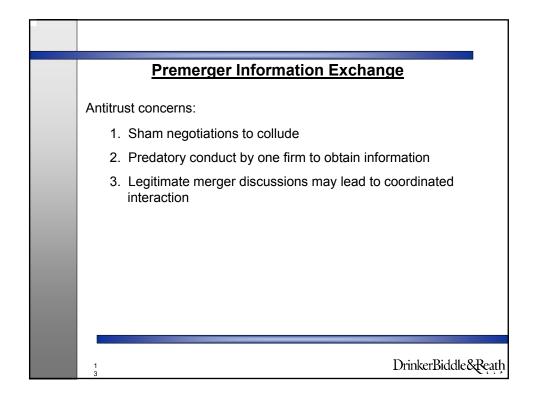
Fitting a Square Peg in a Round Hole?
"Signing the contract transfers some indicia of beneficial ownership. By itself, that transfer is entirely lawful.
But the transfer of additional indicia of ownership during the waiting period
<ul> <li>– such as assuming control through management contracts, integrating operations, joint decision making or transferring confidential information for purposes other than due diligence inquiries –</li> </ul>
are inconsistent with the purposes of the HSR Act and will constitute a violation."
8 DrinkerBiddle&Reath

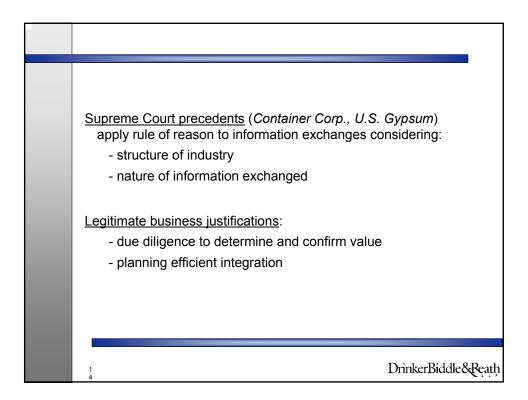


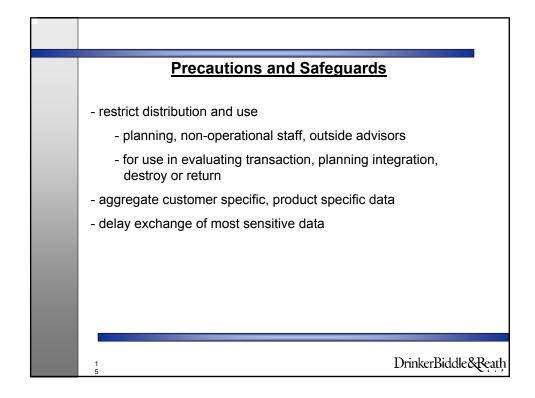
	The Agencies' Position
D	OJ:
	"the pendency of a proposed merger does not excuse the parties of their obligations to compete independently"
F	FC:
	"between the time two competitors agree to merge and when they consummate their transaction, they are separate economic actors who are bound by the competition laws"
	But see International Travel Arrangers v. NWA, Inc. (1993)
	rejects view "only the formal consummation of a merger precludes application of section 1 of the the Sherman Act to an alleged conspiracy between the merging companies"
	DrinkerBiddle8

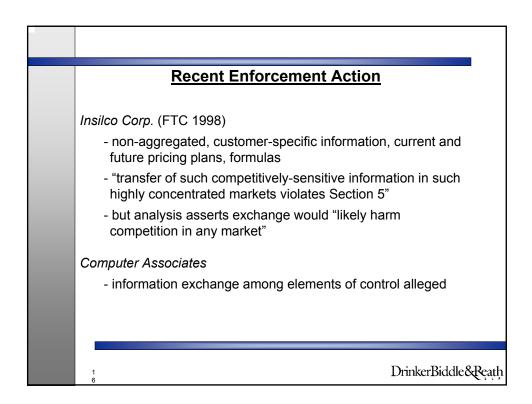












Can Mere Exchange of Information Violate HSR?
"While parties have argued that their intent was merely to plan integration rather than to implement it, we do not think this distinction meets the requirements of the Act
When to-be-acquired firms release information that goes beyond due diligence they are jumping the starting gun that is supposed to be triggered by the expiration of the waiting period
we consider the release of information violates the HSR Act unless the acquired firm can show it would have provided such information to a firm other than the acquiring firm."
1 7 DrinkerBiddle&Reat

## **Gun Jumping**

- HSR Preserving the integrity of the regulatory process
  - may not implement the transaction until the waiting period has expired
  - absence of competitive concerns is irrelevant
- Preclosing activities between the parties when competitive issues exist
  - exchange of information in connection with the merger
  - covenants and provisions in the agreement of sale
  - preparation for start-up (closing) and integration

#### **Business Needs**

- Once announced, the deal should go through
  - usually this is even more important to the seller than to the buyer
- Value must be maintained and captured
- Start up must be smooth (effective)

## **Due Diligence and Integration**

- The process of due diligence (value confirmation) and integration (value capture) is one continuous process
- Due diligence
  - confirms value
  - identifies what needs to be done for successful start up and integration
- Due diligence continues until closing but emphasis shifts from value confirmation to value capture
- Buyers need for information continues until closing



- Traditional rule of reason analysis
- Practitioners are comfortable and experienced in dealing with these issues
- Further guidance not needed
- Must recognize that need for information continues until closing

## **Covenants and Provisions in the Agreement of Sale**

- Seller needs certainty that deal will go through
- · Important to regulatory agencies that approved deals close
- · "Ordinary course of business" covenant is not enough
- Conditions of closing are not a substitute
- Lack of specific covenants may cause less competitive vigor
- In evaluating covenants Gov't should consider the underlying business reality
- Covenants are typically arms length and carefully negotiated

## **Preparation for Start Up**

- Activities prior to closing to facilitate an effective start up should be allowed unless they raise anticompetitive issues.
- Typical case -- information systems
- The business may never recover from a bad start up

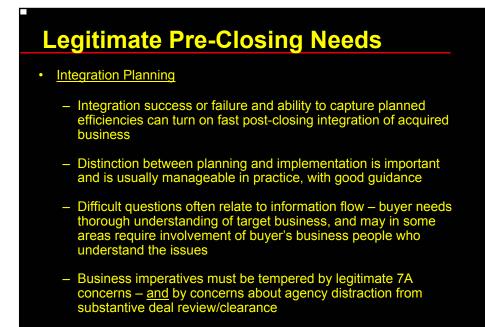


#### **Overview**

- Current business environment makes it especially important that acquisitions be well-planned and well-executed
- Business needs for thorough due diligence and rapid deal integration are legitimate, and should inform the antitrust analysis of pre-closing activities
- Planning for rapid post-closing integration is <u>not</u> about "closing early" but is about ensuring that the integration succeeds at all
- Well-counseled companies can operate in the current legal environment – but some efficient conduct may be impeded at the margin by overly-restrictive guidance
- The agencies can help by sticking to the fundamentals of the (distinct) Sherman Act Section 1 and HSR Act Section 7A analyses
- Practitioners can help by giving practical guidance based on those fundamentals and by avoiding cookbook solutions

## **Legitimate Pre-Closing Needs**

- Due diligence
  - Good information is vital for deal selection and valuation
  - Distinguishing "necessary" vs. "unnecessary" information is elusive – more is usually better
  - But keeping competitively sensitive information out of competing personnel's hands can readily be done with some fairly simple steps
  - Proper legal focus here is Section 1 not 7A
  - Section 1 analysis should usually require rule of reason approach, given presence of legitimate rationales



## **Legitimate Pre-Closing Needs**

- Ordinary Course Conduct
  - Buyer (and seller) have legitimate interest in fixing deal terms and preserving target's value pending closing
  - Sellers and their employees may have incentives (unrelated to competition on the merits) to deviate from the ordinary course and undermine value of the deal
  - Appropriate contractual restrictions on such non-ordinary-course activities should not be condemned simply because they relate to competitive activities – need to examine the facts and justifications
  - Question: What if the discounting in <u>Computer Associates</u> had clearly been <u>outside</u> the seller's ordinary course?

#### **Current Guidance**

- From the Agencies
  - Several cases/consents, many reasonable on their face
  - Agency "gloss" has been more aggressive than the consents
  - Some tendency to blur Section 1 and 7A analyses
  - Potential for overly regulatory approach is burden on the parties to justify any deviations from "no-deal" status quo? Or on the agencies to show the elements of a specific <u>violation</u>?

#### **Current Guidance**

- From Practitioners
  - Unavoidable focus on agencies' consents, speeches in giving guidance
  - Clients' desire for simple do's and don'ts can lead to rigid advice
  - More fact-intensive case-by-case guidance is more useful, but costly and time-consuming
  - Antitrust counsel will appropriately focus on the big picture the need to clear the deal – but this can result in an overly restrictive approach in order to avoid a gun-jumping sideshow

#### **Going Forward**

- No crisis here some complexity and need for judgment calls is probably inevitable
- Not a call for "more guidance" but for adherence to a defined legal framework
- Agencies and practitioners should focus on fundamentals of distinct Section 1/Section 7A analyses:
  - Is there a <u>per se</u> Section 1 violation? Rare, given usual presence of justifications
  - Is there a rule of reason violation for improper information exchange? Real competitive analysis needed
  - Is there a transfer of <u>beneficial ownership</u> giving rise to a 7A violation? Focus on HSR Act Statement of Basis and Purpose