



James A. Fishkin
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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, and chemical and industrial gas firms. He has been a key participant in several of the most significant antitrust cases in the last two decades that have set important precedents, including successfully representing Whole Foods Market, Inc. in *FTC v. Whole Foods Market, Inc.* and successfully representing the Federal Trade Commission in *FTC v. Staples, Inc.* and *FTC v. H.J. Heinz Co.*

Chambers USA ranks Mr. Fishkin as a top antitrust lawyer in Washington, D.C. *Benchmark Litigation* recognizes Mr. Fishkin as an antitrust “litigation star” and praised his expertise in “legal analysis, strategy, and knowledge of government entities.” Mr. Fishkin has also been recognized by *The Legal 500* for his antitrust work.

Significant Representations

- 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 \$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 \$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 Department of Justice to sell its branded and private label yogurt businesses in separate transactions. After a detailed review of each

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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 \$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 Federal Trade Commission seeking to block the company's \$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 \$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 \$495 million acquisition in March 2007 after a detailed review of vertical and horizontal issues by the FTC.

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- 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 \$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 \$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 Federal Trade Commission 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).

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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 Federal Trade Commission, 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).

Professional Activities

Mr. Fishkin is a member of the American Bar Association Antitrust Section.

Publications and Lectures

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 Federal Trade Commission. Mr. Fishkin's recent publications, lectures and presentations include:

- "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) (with Paul T. Denis)
- "Antitrust Merger Efficiencies in the Shadow of the Law," *Vanderbilt Law Review En Banc* Vol. 64:45 (2011)
- "Why the FTC Lost the Whole Foods/Wild Oats Case and Won the Staples/Office Depot Case," LECG Dinner Seminar, Washington, D.C. (May 28, 2008)
- "*FTC v. Whole Foods Market, Inc.*," New York State Bar Association Antitrust Section, New York (September 19, 2007)
- "Historical Review of FTC Supermarket Merger Enforcement: 1997 – 2001," before the FTC conference on "Grocery Store Antitrust: Historical Retrospective & Current Developments," Washington, D.C. (May 24, 2007)
- Panelist, "Buying Power in the Retail Sector," American Antitrust Institute's Fifth Annual Conference: Buyer Power and Antitrust, Washington, D.C. (June 22, 2004)

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Education

University of Iowa, B.A., with distinction, 1983, Phi Beta Kappa

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)

Bar and Court Admissions

Member, District of Columbia and Nebraska Bars

Admitted to practice before the U.S. District Court for the District of Columbia