Antitrust in Retail: Handbag Ruling Won't Go Out Of Fashion

By **David Kully, Jennifer Lada and Anna Hayes** (December 5, 2024)

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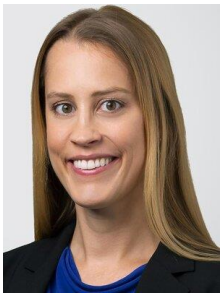

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This article is part of a quarterly column that explores recent antitrust developments in the retail industry and their potential impacts on competition. In this installment, we discuss the recent action aimed at the market for accessible luxury handbags.

"Antitrust has come into fashion," according to U.S. District Judge Jennifer Rochon of the U.S. District Court for the Southern District of New York.[1] In the Biden administration, antitrust enforcement has indeed attracted unusual attention.

But Judge Rochon was not commenting on the trendiness of the topic as much as the rare application of the antitrust laws to the fashion industry — in this instance to a proposed $8.5 billion merger between handbag companies.

In the Oct. 24 Federal Trade Commission v. Tapestry Inc. decision, Judge Rochon granted a preliminary injunction sought by the FTC to prevent Tapestry, owner of the Coach and Kate Spade brands, from acquiring Capri Holdings Ltd., owner of the Michael Kors brand.

Judge Rochon presided over a seven-day hearing in which 16 fact witnesses and four expert witnesses provided live testimony. Judge Rochon found that the FTC made a clear showing that it was likely to succeed during the FTC's in-house administrative proceeding.

During that proceeding, the FTC will need to establish that the proposed acquisition would likely substantially lessen competition in a market for accessible luxury handbags. Judge Rochon enjoined the parties from consummating the transaction pending completion of the FTC's internal process.

Although the case involved both an industry in which antitrust scrutiny had been rare in the past and an unusual market defined around specific brands of otherwise functionally interchangeable products, what was most notable about Judge Rochon's decision was the bland conventionality of her approach.

Her thorough, 169-page opinion marched methodically through each of the elements of the FTC's case and each of the fashion companies' defenses. While siding with the FTC on each issue, Judge Rochon's analysis steered clear of the more aggressive or controversial enforcement positions for which the antitrust agencies have advocated recently.

She relied heavily on ordinary-course documents and witness credibility to support her findings, confirming the critical role internal company records play in shaping merger review decisions.

Despite a seemingly straightforward analysis, Tapestry and Capri attacked Judge Rochon's conclusions as "belied by the record, law, and ... common sense" and added that her findings "ran headfirst into settled precedent" on central issues in the case.[2]

After initially appealing Judge Rochon's decision and seeking expedited briefing to allow the parties to receive a decision from the U.S. Court of Appeals for the Second Circuit before Feb. 10, 2025, the outside date in the parties' merger agreement, Tapestry and Capri on Nov. 14 announced the end of the deal, referring to the "legal uncertainty surrounding the deal" as the principal basis for their decision.[3]

The fashion companies' abandonment of the deal means that Judge Rochon's decision will remain intact, ensuring that it will serve as precedent for future merger challenges. Although the opinion applied standard, noncontroversial antitrust interpretations, several key issues and aspects of the decision stand out as likely candidates for further discussion in future merger litigation.

Accessible Luxury Handbags

The most distinctive feature of the FTC's case was its assertion that the proposed merger would harm competition in a market for accessible luxury handbags, where the Coach, Kate Spade and Michael Kors brands compete for consumers of handbags.

This market excluded lower-priced mass-market handbags and high-priced true luxury handbags.[4] The FTC's asserted Goldilocks-style market — encompassing handbags that are neither too inexpensive nor too luxurious — reflected a rare but not unprecedented approach to identifying the market in which a transaction might harm competition.[5]

Capri and Tapestry fiercely disputed this narrow market definition,[6] but Juge Rochon agreed that "the FTC has successfully described a relevant market."[7] This finding is likely to become the opinion's most enduring aspect, guiding plaintiffs in similar future cases to support their market allegations.

Judge Rochon observed that "accessible-luxury handbags function similarly to mass-market and true-luxury handbags" but that even functionally interchangeable products can "nonetheless be divisible into separate product markets" when market realities support that differentiation.[8]

The court assessed the FTC's proposed market under traditional factors of the U.S. Supreme Court's 1962 decision in Brown Shoe Co. v. U.S.[9]

It found that a distinct accessible luxury handbag market was supported by differences in:

- Materials and craftsmanship;
- Variation in the location of manufacturing facilities;
- So-called massive price differences and differences in the prevalence of retailer discounting; and
- Public recognition of category differences.[10]

Critical to Judge Rochon's decision was what she characterized as "reams of ordinary-course documents" from not only Tapestry and Capri but also from other industry participants referring to an accessible luxury or affordable luxury handbag category.[11]

And in light of this extensive documentary support, Judge Rochon found efforts by the defendants' witnesses to "downplay the significance of the term 'accessible luxury'" as

"arcane and used mostly in speaking with investors" were lacking in credibility.[12]

This factor generally plagued the merging parties' defense, with Judge Rochon finding again and again that the defendants' witnesses' attempts to explain ordinary-course documents lacked credibility.[13]

By relying on credibility determinations for her factual conclusions, Judge Rochon complicated the merging parties' ability to challenge her conclusions on appeal. Trial court findings of fact can be overturned on appeal only if clearly erroneous, and trial court assessments of witness credibility are entitled to deference from appellate courts.[14]

Reliance on the 2023 Merger Guidelines

Another notable aspect of the decision is how Judge Rochon described and relied upon the 2023 merger guidelines. On Dec. 18, 2023, the FTC and the Antitrust Division of the U.S. Department of Justice released a new version of their merger guidelines, a set of principles first promulgated in the 1960s that explain how the antitrust agencies evaluate whether proposed transactions might violate the antitrust laws.[15]

The 2023 merger guidelines embody the more aggressive antitrust enforcement posture pursued by the antitrust agencies under the Biden administration.

Among other things, the 2023 merger guidelines broadened the universe of proposed transactions likely to receive the attention of the antitrust authorities.

It is not clear whether the incoming Trump administration will maintain the revised guidelines or revert to prior versions. But even if the Trump administration were to withdraw its support for the revised guidelines, court acknowledgment of the validity and authority of the revised standards might still mean they will have ongoing impact on future transactions.

Judge Rochon mostly notably offered support for the less stringent threshold used in the 2023 merger guidelines to identify markets that would be highly concentrated after completion of a merger, triggering a presumption that the proposed transaction would harm competition.[16]

In the 2023 merger guidelines, the threshold for a "merger that creates or further consolidates a highly concentrated market," as measured by a tool called the Herfindahl-Hirshman Index, or HHI, was lowered to 1,800.[17]

Under the previous version of the guidelines, published in 2010, the HHI threshold for finding a market highly concentrated was 2,500.[18] Judge Rochon noted that the market concentration thresholds in the 2023 guidelines were the same as those included in 1982, 1992 and 1997 versions, and "the 2010 horizontal merger guidelines were an outlier by adopting higher thresholds."[19]

Judge Rochon's endorsement of the 2023 merger guidelines' concentration threshold ultimately proved unnecessary because the concentration levels in the Capri-Tapestry case all vastly exceeded both the 2023 and 2010 thresholds.[20]

But even if only dicta, state antitrust enforcers and private litigants will still likely refer to Judge Rochon's endorsement in future merger challenges if the Trump administration's antitrust agencies revert to the 2010 standards.

Judge Rochon otherwise noted that she considered the guidelines only "to the extent that the Court finds them persuasive," noting that they were "of course ... nonbinding."[21]

Other than in her discussion of the 2023 guidelines on HHIs and market concentration, she cited to the new guidelines for the unremarkable propositions that antitrust markets have both product and geographic components,[22] that the hypothetical-monopolist test is a "common method of evaluating a proposed market,"[23] and that some fuzziness is inherent in defining antitrust markets.[24]

Judge Rochon also declined the FTC's invitation to endorse the 2023 merger guidelines' position that the government can meet its initial burden in a challenge to a merger "by demonstrating that the merger will eliminate head-to-head competition between close competitors," even without any showing that the transaction will produce a highly concentrated market.[25]

Judge Rochon considered evidence of the "loss of head-to-head competition" as evidence of the merger's anticompetitive effects and not as an independent basis to find a likely violation of Section 7 of the Clayton Act.[26]

Revival of Philadelphia National Bank

In addition to endorsing the 2023 merger guidelines' concentration thresholds, Judge Rochon also credited another threshold for a presumption that a merger is anticompetitive.

In U.S. v. Philadelphia National Bank, the Supreme Court in 1963 established a presumption of anticompetitiveness for mergers creating a firm with at least 30% of the relevant market.[27] Philadelphia National Bank's structural presumption had not been universally embraced by subsequent courts, but Judge Rochon added her voice to other recent support.[28]

Applicable Standard of Review

The final point of note in Judge Rochon's decision is her observation concerning the standard of review on motions by the FTC in federal court to enjoin proposed mergers.

The FTC argued that its burden was to establish the existence of "serious questions about the antitrust merits" warranting consideration during the FTC's administrative process.[29] Tapestry and Capri argued for a more stringent standard, believing that the FTC was obligated to make a clear showing of likelihood of success on the merits.[30]

Judge Rochon did not explicitly endorse either standard, finding that the FTC prevailed under either standard.[31]

Judge Rochon noted that under the presumption of regularity, a reviewing court would presume that the FTC properly discharged its duty by considering all evidence and accurately applying the law to the facts, leaving "little practical difference between the parties' positions."[32]

The judge made this point during a discussion of whether the FTC needed to demonstrate only a likelihood of success in the administrative hearing (the FTC's view) or an ultimate likelihood of success after review on appeal of the FTC's decision (the merging parties' more stringent view).

This point is potentially significant for the FTC, which will refer to Judge Rochon's implicit

support for its less-stringent standard in future merger challenges.

Summary

Antitrust law might not remain fashionable if the Trump administration, as many expect, scales back on antitrust enforcement efforts.

But Judge Rochon's decision to enjoin Tapestry's acquisition of Capri, while unremarkable in many respects, provides valuable support for antitrust enforcers, particularly in future cases seeking to define markets around narrow segments of otherwise interchangeable products.

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[1] Opinion & Order ("Rochon Opinion") at 1, FTC v. Tapestry, Inc., No. 1:24-cv-03109 (S.D.N.Y. Oct. 24, 2024) (ECF No. 339).

[2] Defs-Appellants' Emergency Mot. for Expedited Proceedings at 5, FTC v. Tapestry, Inc., No. 24-2848 (2d Cir. Oct. 29, 2024) (ECF No. 19.1).

[3] See Denny Jacob, "Tapestry, Capri End Merger Hopes Amid Legal Uncertainty," Wall Street Journal (Nov. 14, 2024).

[4] Rochon Opinion at 20-21.

[5] See David Kully, "Antitrust in Retail: The Meaning of 'Accessible Luxury,'" Law360.com (July 1, 2024). See also Rochon Opinion at 24-25 (noting that "price and quality differences" supported distinct markets in past cases for "championship" boxing contests, "top-grossing films," higher-and-lower-priced sporting goods, "top-selling" books, "elite" MMA bouts, and "moderately-priced glassware").

[6] Rochon Opinion at 15.

[7] Id. at 21.

[8] Id. at 21-23.

[9] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[10] Rochon Opinion at 26-63.

[11] Id. at 49.

[12] Id. at 48-49.

[13] Id. at 54-56 (concerning repeated groupings of the same competing brands); 81 n.30 (concerning the import of a document sent to Tapestry's board); 142 (concerning success of existing efforts to reinvigorate the Michael Kors brand); 144-45 (concerning constraints on Tapestry's pricing if the merger were to be consummated); 150 n.45 (concerning the closeness of competition between the merging parties); 153 (concerning the extent to which Michael Kors' pricing currently constraints Tapestry's pricing); 154 n.49 (concerning the explanation for Tapestry tracking Michael Kors' pricing).

[14] See, e.g., Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985).

[15] See U.S. Department of Justice & the FTC, "Merger Guidelines" (Dec. 18, 2023) ("2023 Merger Guidelines").

[16] Rochon Opinion at 98.

[17] Id. An HHI is calculated "by summing the squares of each market participant's share of the relevant market." Id. at 97.

[18] See U.S. Department of Justice & the FTC, "Horizontal Merger Guidelines," at 19 (Aug. 19, 2010).

[19] Rochon Opinion at 98-99 n.35.

[20] Id. at 99 (HHI of 3,646 was "more than high enough to create a presumption – indeed, a strong presumption – of anticompetitive effects").

[21] Id. at 14-15 n.3. Judge Rochon also took issue with the merging parties' statement that no court had cited the 2023 Merger Guidelines as even persuasive authority, citing to three prior decisions in which the Guidelines had been cited. Id.

[22] Id. at 14.

[23] Id. at 17.

[24] Id. at 19.

[25] Id. at 147-48 n.43.

[26] Id.

[27] United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963).

[28] See, e.g., FTC v. IQVIA Holdings Inc., 710 F. Supp. 3d 329, 378-79 (S.D.N.Y. 2024).

[29] See Rochon Opinion at 10.

[30] See id.

[31] Id.

[32] Id. at 11.