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ANTITRUST CHALLENGES TO CONSUMMATED MERGERS

“IT’S NEVER OVER”

*John G. Calender
Robert E. Hauberg, Jr.*

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Overview

- Antitrust Challenges to Consummated Mergers Have Increased Significantly
- Pre-Merger Filings Are Down Significantly
- Even HSR Filed Mergers Have Been Challenged After Consummation
- HSR Filing Not an Approval
- No De Minimis Exceptions to Section 7
- Very Small Mergers Have Been Challenged (as small as \$5 million)
- No Apparent Statute of Limitations

Overview (cont.)

- FTC Has 3 Challenges to Consummated Mergers Now Pending
- FTC Currently Investigating CVS/Caremark Merger
- Joint DOJ and USDA Agricultural Workshops on Increased Concentration
 - Focus on seeds, chemicals, meat and dairy and food manufacturing and retailing
 - Small farms being lost at “astronomical and intolerable rates”

Overview (cont.)

- New Section in Recent Draft Horizontal Merger Guidelines (April 20, 2010) on Consummated Mergers, § 2.1.1
 - Post-merger price increases/adverse changes given substantial weight
 - But agencies also conduct same analysis as for unconsummated mergers (merged firm may be moderating conduct)
- Consummated Mergers Can Be Low-Hanging Fruit
 - Merged firm can create incriminating evidence of price increases/anticompetitive conduct/bad documents
 - Merged firm complacent/confident

Overview (cont.)

- Agencies Alerted by Customer Complaints
 - Sometimes from jilted suitors/disappointed bidders
- Agencies Will Act Swiftly to Prevent Scrambling of Assets
- Immediate Discovery and Preliminary Injunctions/Hold Separate Orders if Necessary
- Agencies Will Start Planning for Litigation Immediately
- Agencies Will be Skeptical of Post-Acquisition Evidence of Pro-Competitive Conduct/Efficiencies
- Should You Seek Agency Clearance Before Consummating Sub-HSR Questionable Deal?
 - Agencies say yes – will ask for 4(c) documents, hold separate, timing agreement
 - Agencies - we will find out and don't you want to tell your story first?

Overview (cont.)

- Remedies – A Wide Variety
 - Structural – Total divestiture, strongly preferred, avoids unscrambling the eggs
 - Divest assets
 - License IP/trade secrets
 - Hold separate pending divestiture
 - Behavioral
 - Separate negotiating teams
 - Grant customer options to renegotiate contracts
 - Revoke non-competes
 - Disgorgement of Profits
 - Fines for Gun Jumping and Failure to File

In the Matter of Evanston Northwestern HealthCare Corp., FTC Docket No. 9315

- In February 2004 FTC filed administrative complaint challenging January 2000 merger of Evanston Northwestern Healthcare and Highland Park Hospital for \$200 million
- HSR had been filed
- FTC alleged higher prices to health insurers and consumers in north Chicago area
- ALJ found in favor of Commission in October 2005 Initial Decision and ordered divestiture
 - 225 page single spaced decision
 - 1600 exhibits, 42 witnesses, many expert witnesses

In the Matter of Evanston Northwestern HealthCare Corp., FTC Docket No. 9315 (cont.)

- Incriminating Evidence:
 - Substantial evidence of significant price increases
 - Documents emphasized merger creates opportunity to join forces and grow together rather than compete with each other
- In August 2007 FTC upheld ALJ's findings but deemed divestiture too drastic due to costs and disruption to patient services
- FTC ordered separate and independent negotiating teams with firewalls to allow for separate negotiations with each hospital

In the Matter of Evanston Northwestern HealthCare Corp., FTC Docket No. 9315 (cont.)

- FTC discredited much of Evanston's arguments including helpful managed care testimony and quality improvements
- Community support in briefs and raised in oral argument
- FTC stressed conduct remedy not ideal but could be done in a short period of time versus complex lengthy and expensive divestiture after seven years
- FTC stressed this is highly unusual case and much preferred remedy is divestiture
- Follow-on class action in 2008 alleged monopolization and attempted monopolization under Section 2 as well as a Section 7 claim. The district court rejected class certification but plaintiffs have filed an appeal

*In the Matter of Scott & White Healthcare,
FTC File No. 091-0084, Dec. 23, 2009*

- Hospital acquisition which eliminated only independent competitor to Scott & White in Bell County, Texas
- Non-reportable transaction consummated in April 2009
- FTC staff had serious concerns and recommended litigation to unwind.
- Texas AG involved as well
- But FTC staff recognized precarious financial condition and real potential of closure of King's Daughter and declined action
- Agreement allowed alternative purchaser to acquire at specific terms if interested
- Alternative purchaser declined based on deteriorating financial condition before and after merger
- King's Daughter qualified for failing firm defense since no alternative purchaser

*U.S. et al., v. Election System & Software
(D.D.C. March 2010)*

- September 2009 acquisition of Premier Election for \$5 million
- ES&S was largest provider of voting equipment systems and Premier was number 2
- Substantial criticism from legislators and public interest groups
- Nine state AGs joined DOJ in challenge
- March 2010 Consent Order - ES&S must divest means to produce all versions of Premier's hardware, software and firmware used to record, tabulate, transmit or report votes, and grant limited fully paid up perpetual license to one of ES&S' systems
- Must give divestiture buyer opportunity to compete to provide services to Premier customers currently under contract with ES&S

*In the Matter of Polypore International, Inc., FTC
Docket No. 9327*

- Polypore February 2008 acquisition of rival battery separator manufacturer Microporous L.P. for \$76 million
- FTC filed administrative Section 7 and monopolization complaint on September 2008 also challenging Polypore's agreement with another competitor as an illegal market allocation under Section 5
- Lengthy FTC administrative trial – 6,000 pages of trial transcript, 35 witness, over 2100 exhibits
- ALJ issued almost 400 page single spaced opinion March 5, 2010, finding acquisition and agreement anticompetitive under Section 7 and Section 5 and ordering divestiture and revision of agreement
- Currently on appeal to FTC

In the Matter of Carilion Clinic, FTC Docket No. 9338

- FTC administrative complaint dated July 24, 2009, challenging Carilion Clinic's August 2008 acquisition of two competing outpatient clinics in Roanoke, Virginia area for \$20 million
- Alleged small local geographic market
- Complaint alleged that out of pocket costs for many patients would increase by 900 percent
- Carilion agreed to October 2009 consent order to divest the two outpatient clinics within 3 months
- Order also prohibits Carilion from soliciting physicians who referred patients to other clinics and to preserve viability of assets prior to divestiture

*In the Matter of Lubrizol Corp. and Lockhart Co.,
FTC File No. 071-0230*

- FTC challenge to Lubrizol acquisition of product line of chemical additive (oxidates) used to make rust preventatives for \$15.6 million in February 2007
- Alleged that market highly concentrated with Lubrizol and Lockhart top two providers
- Little likelihood of new entry/expansion
- Lubrizol agreed to February 2009 consent order to transfer oxidate assets to another company and to eliminate a non-compete provision put in place with Lockhart

U.S. et al. v. Dean Foods Co., 10-CV-0059
(E.D. Wis. Jan. 2010)

- DOJ lawsuit with Illinois, Michigan and Wisconsin AGs, seeking divestiture of two Foremost dairy processing plants acquired in April 2009 for \$35 million
- Plaintiffs allege acquisition eliminated a key rival, curbing competition in school sales, grocery stores and other retailers
- 57% market share in geographic market of Wisconsin, northeastern Illinois and Michigan upper peninsula
- Dean Foods motion to dismiss on relevant geographic market denied, April 7, 2010
- But Court criticized DOJ: “lack of specificity in content associated with underlying complaint, simply do not measure up to that which any court would reasonably expect in draftsmanship from an experienced litigator”

U.S. v. KeySpan Corp. (S.D.N.Y. Feb. 22, 2010)

- Complaint seeks disgorgement of \$12 million in profits from anticompetitive agreement in NYC electricity capacity market
- January 2006 agreement that gave KeySpan financial interest in electrical capacity sales of largest competitor
- KeySpan was largest seller in NYC market
- Eliminated KeySpan's incentive to sell its electricity capacity at lower prices and retail electricity prices likely higher

FTC v. Ovation Pharmaceutical Inc. (D. Minn. Dec. 2008)

- 2008 federal court challenge to January 2006 acquisition by Ovation which eliminated only competitor for treatment of potentially deadly congenital heart defects affecting premature babies
- Federal court action seeks divestiture and disgorgement of profits
- FTC alleges Ovation promptly raised prices 1300 percent, from \$36 to \$500 a vial

In the Matter of TALX, Inc., FTC File No. 061-0209

- Challenge to series of acquisitions in 2003-2005 based on lessening of competition in outsourced compensation management and verification of income services
- FTC focused on cumulative effects of acquisitions, not on a single acquisition; company acquiring virtually all its competitors
- April 2008 Complaint and Consent - Conduct remedy, no divestiture
 - Cannot enforce certain provisions of non-compete and non-solicitation agreements
 - Allow termination of certain contracts
 - Advance notice of future acquisitions

*In the Matter of TALX, Inc., FTC File No. 061-0209
(cont.)*

- Commission states it prefers divestiture, but unique circumstances appropriate for conduct relief to encourage movement of business to competitors and expedite entry and expansion of competitors
- Unique circumstances
 - Personal service nature of product
 - Divergent customer preferences and needs
 - Several very small but viable competitors

*In the Matter of Inverness Medical Innovations,
FTC File No. 0610123 (Dec. 23, 2008)*

- FTC administrative complaint and consent order, December 2008, regarding 2006 acquisition of competing manufacturer of consumer pregnancy tests
- Order requires divestiture of certain types of pregnancy tests and elimination of certain restrictions/covenants not to compete on other types of tests

U.S. v. Microsemi Corp. (C.D. Cal. Dec. 2008)

- DOJ challenge to July 2008 acquisition of competing manufacturer of certain small signal transistors that meet most stringent standards of Department of Defense
- DOJ sought divestiture and preliminary injunctive relief to preserve assets
- DOJ alleged significant price increases and threats to impose less favorable terms on customers
- Also alleged elimination of potential competition
- Revenues of acquired company only \$14.7 million
- August 2009 settlement requiring total divestiture

*In the Matter of Aspen Technology, FTC
Docket No. 9310*

- Acquisition of competing supply chain simulation computer software in May 2002 (non-reportable)
- FTC filed administrative complaint in August 2003
- July 2004 Consent Order requiring divestiture and requiring support services and licensing
- Aspen failed to comply with divestiture
- FTC in August 2009 imposed additional requirements on Aspen expanding obligations to remediate due to Aspen's failure to comply

U.S. v. Daily Gazette Co. and MediaNews Group
(D.W.Va. May 2007)

- Challenge to May 2004 acquisition of only competing newspaper in Charleston, W.Va. (non-reportable)
- Acquiror suspended termination of second newspaper when it learned of DOJ investigation
- Settlement reached in January 2010 to restore independent control of acquired newspaper

*In the Matter of Dan L. Duncan, EPCO, Inc. et al.,
FTC File No. 051-0108*

- FTC complaint and consent order, August 2006, involving 2005 acquisition that combined natural gas liquids storage businesses
- FTC alleged combination would likely result in higher prices and service degradations by reducing storage providers in Mont Belvieu, Texas from four to three
- Divestiture ordered

U.S. v. Cameron Int'l Corp. (D.D.C. Nov. 17, 2009)

- DOJ required divestiture of refinery desalter assets purchased in 2005 in order to proceed with pending acquisition
- Also required a non-exclusive license to certain technology

*U.S./Kentucky v. Dairy Farmers of America
(D. Ky. 2003)*

- 2003 challenge to acquisition of competing dairy based on reduced competition for school milk contracts
- District Court dismissed, Court of Appeals reversed
- Divestiture settlement announced October 2006

*In the Matter of Chicago Bridge & Iron Co.,
FTC Docket No. 9300*

- October 2001 FTC administrative complaint challenging February 2001 acquisition alleging reduced competition in market for specialty industrial storage tanks
- ALJ Initial Decision June 2003 ordering divestiture
- FTC Opinion January 2005 ordering divestiture
- January 2008 Opinion of 5th Circuit upholding FTC and ordering divestiture

Gun Jumping & Failure to File

- January 2010 – Smithfield Foods agrees to \$900,000 penalty for gun jumping in connection with 2007 acquisition of Premium Standard
 - Violated pre-merger waiting period
 - Buyer approval of seller's ordinary course contracts prior to acquisition
 - Smithfield was approving hog procurement contracts
- June 2009 – Media executive John Malone agrees to pay \$1.4 million for HSR failure to file for acquisition of Discovery Securities during August 2005 through July 2008
- April 2006 – Qualcomm agrees to \$1.8 million penalty for exercising operational control of Flarion prior to January 2006 consummation

- John G. Calender
Baker Donelson Bearman Caldwell & Berkowitz
555 11th Street, NW, 6th Floor
Washington, DC 20004
(202) 508-3474
- Robert E. Hauberg, Jr.
Baker Donelson Bearman Caldwell & Berkowitz
555 11th Street, NW, 6th Floor
Washington, DC 20004
(202) 508-3481