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Beating the Competition: Antitrust Issues in Mergers & Acquisitions

I. Introduction

Antitrust enforcement of mergers and acquisitions (M&A) has been occurring at a frantic pace in recent years. The two federal antitrust agencies, the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ), have been extremely aggressive in investigating and challenging transactions that may be harmful to competition and recently have brought a string of lawsuits opposing M&A deals, large and small, in a variety of industries. Several of these challenges were resolved through settlements, some are still pending, and other transactions were blocked or abandoned. Even for transactions that are reviewed and ultimately cleared, merger investigations are taking longer to complete.

What do these cases mean for companies and deal makers? These recent challenges demonstrate the willingness of the antitrust agencies to litigate and their ability to win. These cases also reaffirm that deals of any size and scope, in any industry, are potentially open to lengthy and costly antitrust scrutiny. The solid waste and recycling industry, with its long history of antitrust enforcement of M&A transactions and other conduct, is certainly not

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immune. This trend highlights why it is critical for buyers and sellers to consider carefully, and as early as possible, the antitrust risks when contemplating a transaction, and take appropriate steps to mitigate those risks.

II. The Legal Framework

The concern with mergers and acquisitions under the antitrust laws is the creation or enhancement of market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation or otherwise harm customers as a result of weakened competitive constraints or incentives. Antitrust concerns are most common in mergers of close competitors in concentrated markets, though other types of transactions, such as acquisitions of key suppliers or customers, also can pose an issue.

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The key law in this area is Section 7 of the Clayton Act, which prohibits mergers and acquisitions that may substantially lessen competition in a relevant market. The Clayton Act was amended by the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") to require companies planning large transactions to notify the government of their plans in advance. These laws afford the federal government an opportunity to review and, if appropriate, seek to stop potentially anticompetitive transactions in their incipiency. State attorneys general and private parties also can challenge M&A deals for violating Section 7 of the Clayton Act.

Under the HSR Act, many mergers and acquisitions valued above a specific dollar amount (currently $78.2 million, adjusted annually) must be reported to the FTC and DOJ. In such HSR-reportable transactions, the parties must observe a waiting period prior to closing (usually 30 calendar days) to give the agencies time to review the transaction for competitive concerns. Failure to comply with the HSR Act carries a potential penalty of up to $16,000 per day.

A common misconception is that if an HSR filing is not required, either because a deal falls below the dollar thresholds or one of the limited exemptions from HSR applies, the transaction is safe from antitrust scrutiny. This is wrong. The antitrust agencies have legal jurisdiction over *all* M&A transactions that affect U.S. commerce, irrespective of the size of the parties, the transaction or the markets involved. Moreover, deals can be challenged anytime, *even years after closing*. The FTC and DOJ actively have pursued non-reportable transactions in recent years.

III. Recent Trends in Antitrust M&A Review

The antitrust agencies have been on a roll in blocking mergers and acquisitions they have determined to be bad for competition. A sampling of recent cases shows that they run the full gamut in terms of size, geographic scope and industry. Some of these have been widely reported in the press, such as the FTC's successful bid to block Staples Inc.'s proposed $6.3 billion acquisition of competing office supply chain Office Depot Inc. in May 2016 and General Electric's decision in December 2015 to terminate the $3.3 billion sale of its appliances business to Electrolux after the DOJ sued in federal court to block the transaction.

Other successful challenges have involved smaller transactions and received less widespread attention, yet the consequences for the transacting parties have been just as severe. In 2014, the FTC and the Idaho Attorney General obtained a court ruling that the previously consummated $28 million acquisition by St. Luke's Health System of Idaho's largest independent, multispecialty physician practice group, Saltzer Medical Group, violated the antitrust laws. The court agreed with the government that the acquisition gave the combined entity a dominant market position for primary health care services in Nampa, Idaho, and would likely lead to anticompetitive price increases. St. Luke's was ordered to fully divest itself of Saltzer's physicians and assets, and in 2015 that decision was affirmed on appeal. In 2013, the DOJ filed a lawsuit against Bazaarvoice Inc., a provider of online product ratings and reviews platforms, challenging its consummated $168 million acquisition of a competitor, PowerReviews Inc. A federal district court found the acquisition substantially lessened competition in violation of the Clayton Act. Bazaarvoice agreed to divest the assets it acquired from PowerReviews and meet other requirements to fully restore competition in the relevant market.

The St. Luke's/Saltzer and Bazaarvoice/PowerReviews cases are just two examples in an ever-growing list of non-HSR-reportable transactions that have been challenged by the antitrust agencies and resulted in asset divestitures or other remedies to resolve the agencies' concerns. In the four-year period from 2009 to 2013 (the most recent period for which data are available), almost 20 percent of DOJ merger investigations involved non-reportable deals and more than 1 in 4 of those resulted in a challenge.

The St. Luke's/Saltzer case also shows that the agencies are willing to scrutinize deals even where the geographic impact is limited to a single local area. This is especially relevant in the solid waste and recycling industries, in which many companies serve customers within a small geographic radius such as a metropolitan area or county. In March 2015, for example, the DOJ required Waste Management Inc. to divest small container commercial waste collection routes in three local geographic areas in Kansas and Arkansas as a condition to its $405 million acquisition of Deffenbaugh Disposal Inc.

Of course, only a small percentage of all transactions are actually challenged on antitrust grounds. Every year, hundreds of deals are reported to the FTC and DOJ under the HSR Act and are cleared, in many cases quickly. However, another subset of transactions do pass antitrust muster, but only after a lengthy, burdensome and expensive review process. And that review

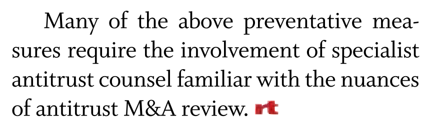
process is taking longer on average, with the agencies sometimes demanding massive volumes of documents and extensive amounts of data from the transacting parties. Companies in a number of recently completed mergers had to wait more than a year for a final decision, such as AT&T/DirecTV (14 months) and Zimmer/Biomet (14 months). These lengthy investigations create uncertainty for employees, customers and investors. While the HSR Act does afford merger parties certain timing protections, as a practical matter companies usually agree to give the government additional time if they believe that could help to avoid a lawsuit challenging the deal. Experienced antitrust counsel can help the parties navigate these issues.

IV. Key Takeaways

Despite the current aggressive antitrust enforcement climate, companies can do a number of things to reduce the risk of an investigation or challenge and to avoid unnecessary delays:

- **Be Prepared –** Transacting parties should perform antitrust due diligence early and irrespective of deal size, especially in a strategic combination of competitors. An upfront antitrust assessment can ensure companies go into a deal with their eyes wide open and can help avoid unpleasant surprises down the road. Often, parties will be able to rule out any serious antitrust issues with minimal time and expense.
- **Set Realistic Timelines –** Another benefit of doing an antitrust analysis early is that this can inform the business team in developing a realistic closing timeline. If the deal is HSR-reportable, the parties will need to factor in the HSR waiting period and the likelihood of an in-depth review. If the deal is not reportable, the parties should still get comfortable that it is unlikely to attract antitrust scrutiny pre-closing.
- **Pay Attention to Antitrust Language in the Contract –** Many M&A agreements contain antitrust-related provisions, such as antitrust-specific representations and warranties, conduct of business covenants, cooperation provisions, risk-shifting covenants, conditions precedent to closing and antitrust breakup fees. These provisions can be critical in allocating antitrust risk between buyer and seller and in defining each party's role in the antitrust process, so they should be given due attention.
- **Be Careful When Creating Documents –** Internal business documents, including emails, of transacting parties will often carry substantial weight in an antitrust analysis. Government agencies and courts believe that the best predictor of a merger's likely impact on competition is the views of the merging parties themselves as expressed in their own documents. Companies therefore should be sensitive to the implications that the content and phrasing of business documents may have for both current and future transactions. Business personnel should take basic precautions to avoid creating documents that convey misleading and inaccurate impressions or that suggest an anticompetitive motive for, or likely anticompetitive impact from, a proposed transaction. This applies to documents prepared in the ordinary course of business, as well as to materials prepared specifically for a contemplated transaction.
- **Don't Forget Your Customers –** Apart from the obvious business reasons for keeping customers informed about a transaction and educating them on its benefits, good antitrust reasons are present for doing so. Customer complaints to an antitrust agency often carry significant weight and can lead to enhanced and prolonged scrutiny. They are also a common means by which agencies learn of non-reportable acquisitions.
- **Don't Ignore Non HSR-Reportable Transactions –** Companies that assume a small deal is automatically safe from antitrust examination do so at their peril, especially if the merging businesses are close competitors in a market with few players. Non-HSR-reportable acquisitions involve unique risks and strategic considerations, particularly for the buyer in situations with a chance of a post-closing antitrust inquiry. The optimal strategy for a specific transaction will depend on a number of factors, including the substantive antitrust risk (i.e., the likelihood of anticompetitive effects), the probability of government detection (e.g., because of media coverage or complaints from customers or competitors) and the parties' desire for pre-closing certainty.

Many of the above preventative measures require the involvement of specialist antitrust counsel familiar with the nuances of antitrust M&A review. rt



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