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ANTITRUST

Expert Analysis

FTC Challenges Health Care Mergers in Administrative Actions

By **Elai Katz**

The Federal Trade Commission (FTC) contested two health care-related mergers by filing complaints in its administrative tribunal. One involved the acquisition of two outpatient clinics by a hospital system in Virginia, and the other involved a heartpump maker's proposed acquisition of a prospective competitor. The Department of Justice settled challenges to a merger involving the only domestic manufacturers of aluminum sheathing and a completed combination of the two suppliers of particular semiconductor devices used for military and space programs.

Other recent antitrust developments of note included proposed legislation to overturn recent Supreme Court decisions that abandoned longstanding precedents and the Department of Transportation's decision to grant antitrust immunity to an airline alliance, taking into consideration some of the concerns expressed by the Department of Justice.

Acquisitions

Clinics. The FTC commenced an administrative action challenging the August 2008 acquisition of two outpatient clinics in the Roanoke, Va., area by the leading local hospital system. The acquisition had been completed without providing notice to antitrust authorities and observing the premerger waiting period because the value of the transaction did not exceed the statutory reporting thresholds.

The commission alleged that the hospital system was the largest local provider of health care and controlled 80 percent of the hospital beds in the area. The complaint asserted that the acquisition reduced from three to two the number of providers of surgical services and outpatient imaging in the region and would result in higher health care costs. The FTC noted that, prior to the acquisition, the acquired clinics had strong reputations for high quality at relatively low prices.

A couple of weeks after the filing of the administrative complaint, the parties jointly sought to withdraw the matter from adjudication for the purpose of considering a settlement agreement.

Carilion Clinic, Docket No. 9338 (July 23, 2009), CCH Trade Reg. Rep. ¶16,338, also available at www.ftc.gov

Heart Pumps. A mechanical heart pump maker abandoned its plans to acquire a potential rival after the FTC asserted that the proposed combination would substantially reduce competition in the domestic market for left ventricular devices, which are surgically implanted blood pumps. The FTC alleged that the buyer's products were the only approved left ventricular devices currently on the market and that the firm to have been acquired was developing a promising competitive product.

> The FTC commenced an administrative action challenging the acquisition of two outpatient clinics in the Roanoke, Va., area by the leading local hospital system.

The commission stated that the product in development was expected to be the next such product to be approved by the Food and Drug Administration and that, with its novel design and superior reliability, it had already put competitive pressure on the buyer. The FTC also alleged that the proposed acquisition constituted an unlawful attempt and conspiracy to maintain the buyer's monopoly by eliminating the only significant threat to its dominance of the market.

Thoratec Corp. and HeartWare International Inc., FTC Docket No. 9339 (July 28, 2009), CCH Trade Reg. Rep. ¶16,340, also available at www.ftc.gov; *Thoratec Corporation and HeartWare International Inc. Announce Termination of Proposed Transaction* (July 31, 2009 press release)

Aluminum Sheathing. The Department of Justice announced the settlement of charges that the proposed combination of two firms involved in the manufacture of aluminum sheathing, which is used to make high frequency coaxial cable purchased by cable television providers, would substantially lessen competition in violation of §7 of the Clayton Act. The department asserted that the two firms were the only manufacturers of aluminum sheathing in the United States and required divestiture of one of the two companies' aluminum sheathing facilities to permit the merger to proceed.

The settlement agreement also provides that in the event the companies do not sell one of the two facilities promptly to an acceptable purchaser, they will be required to sell an entire extruded aluminum plant which produces a variety of aluminum products in addition to aluminum sheathing.

United States v. Sapa Holding AB and Indalex Holdings Finance Inc., No. 1:09-cv-01424 (D.D.C. July 30, 2009), CCH Trade Reg. Rep. ¶45,109 (No. 5037), ¶50,968, also available at www.usdoj.gov/atr

Semiconductor Devices. The Department of Justice announced the settlement of a pending lawsuit challenging the completed, non-reportable acquisition of a small rival by a producer of specialized semiconductor devices used in military and space applications. The department stated that the two firms had been the only makers of qualified small signal transistors and that the settlement requires the divestiture of virtually all the acquired assets.

United States v. Microsemi, No. 8:09-cv-00275-AG-AN (C.D. Calif. Aug. 20, 2009), available at www.usdoj.gov/atr

Comment: The enforcement action reported immediately above and the FTC's administra-

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tive action against the Virginia hospital system call attention to the fact that even small, non-reportable transactions can draw antitrust scrutiny, particularly when the agencies perceive a considerable threat to competition.

Pending Legislation

Several bills have been introduced in Congress to overturn recent Supreme Court antitrust decisions. The Notice Pleading Restoration Act, introduced by Senator Arlen Specter, would require federal courts to examine the sufficiency of complaints under the standards prevailing prior to the more demanding test set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The proposed legislation expressly provides for reinstatement of the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957).

Another bill, the Discount Pricing Consumer Protection Act of 2009, introduced by Representative Henry Johnson, provides that minimum resale price agreements would violate the Sherman Act; the bill would overturn *Leegin Creative Leather Products Inc. v. PSKS Inc.,* 551 U.S. 877 (2007). The law, if passed, would restore the per se prohibition first annunciated in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). A similar bill was introduced in the Senate earlier this year.

The Notice Pleading Restoration Act, S. 1504, 111th Congress, 1st Session (July 22, 2009) and *The Discount Pricing Consumer Protection Act of 2009*, H.R. 3190, 111th Congress, 1st Session (July 13, 2009).

Immunities

The Department of Transportation granted antitrust immunity for a leading U.S.-based airline to join an alliance that includes another leading U.S.-based airline and several other European and Canadian airlines. The immunity permits the airlines to coordinate their services and act as a single carrier for particular international air services. The order also granted immunity for four members of the alliance to form a joint venture whereby the airlines will collectively manage capacity, sales and marketing and share revenues for a portion of their international business. The Department of Transportation stated that the immunized collaborations would increase service levels, shorten travel times and reduce fares.

The Department of Transportation noted that it placed limitations on the immunity in several markets, including flights between the United States and Beijing, China, and flights between New York and Scandinavia and Switzerland, in response to comments submitted by the Antitrust Division of the Department of Justice. The Department of Justice had stated that exemptions from antitrust laws are disfavored and that requests for immunity should be narrowly tailored to achieve the claimed public benefits.

Joint Application of Air Canada, The Austrian Group, British Midland Airways Ltd, Continental Airlines Inc., Deutsche Lufthansa AG, Polskie Linie Lotniecze Lot S.A., Scandinavian Airlines Systems, Swiss International Air Lines Ltd., TAP Air Portugal, United Air Lines Inc., DOT Docket No. OST-2008-0234 (July 10, 2009), available at www.regulations.gov; *DOT Approves Star Alliance Plan to Add Continental, Establish Joint Venture,* DOT Press Release 100-09 (July 10, 2009), available at www. dot.gov; Comments of the Department of Justice on the Show Cause Order (June 26, 2009), available at www.usdoj.gov/atr

Tying

Buyers of newly constructed houses in Boise, Idaho, brought antitrust claims alleging that real estate brokers representing the developers of their houses unlawfully tied the sale of undeveloped lots to brokerage services for developed property. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment for defendants and stated that the alleged tie-in did not affect a substantial volume of commerce in the tied product market (brokerage services).

> The Discount Pricing Consumer Protection Act of 2009 provides that minimum resale price agreements would violate the Sherman Act and would overturn 'Leegin Creative Leather Products Inc. v. PSKS.'

The homebuyers claimed that the arrangements constituted per se unlawful tying and that they were forced to pay commissions to their developers' brokers for services they did not need or want. The Ninth Circuit observed that when buyers are forced to buy a product they would not have bought even from another seller there is no impact on competition (or "zero foreclosure") because the forced sale does not foreclose any portion of the market which would otherwise have been available to other sellers.

Blough v. Holland Realty Inc., 2009-2 CCH Trade Cases ¶76,689

Comment: The decision reported immediately above did not reach an alternate dispositive issue: whether payments of commissions to agents or brokers who represent the seller of a product are appropriately characterized as a separate service market from the product itself for purposes of a tying claim rather than merely a portion of the cost of buying the product.

Non-Compete Covenant

The Supreme Court of Georgia ruled that an agreement prohibiting a franchisee operating several bakery and deli franchises from engaging in any other bakery and deli businesses during the term of the franchise agreement was unreasonable and unenforceable under Georgia law.

The Court noted that the covenant was not limited geographically and did not sufficiently specify the prohibited activity. The Court observed that such partial restraint of trade agreements were disfavored in Georgia as a matter of public policy and refused to "blue pencil" the agreement to insert a territorial limitation that would render the covenant enforceable.

Atlanta Bread Co. Int'l Inc. v. Lupton-Smith, 2009-2 CCH Trade Cases ¶76,674

Interstate Commerce

A surgeon alleged that he was denied reappointment to a nonprofit community hospital in Delaware in violation of federal antitrust law and state common law. A federal district court dismissed the Sherman Act claims for failing to plead any effect on interstate commerce.

The court acknowledged that, in other cases, complaints asserting the exclusion of a single doctor from a local hospital or market were found to satisfy the commerce requirement, but noted that those complaints alleged the performance of services for out-of-state patients and the receipt of revenue from out-of-state sources. In contrast, the complaint before the court did not mention out-of-state patients or funds and specifically alleged harm in a single Delaware county.

Villare v. Beebe Medical Center Inc., 2009-2 CCH Trade Cases ¶76,676 (D. Del.)