Through the Looking Glass: Documents Hosted Overseas and Grand Jury Subpoenas

Page 5

No Man Is An Island: Transatlantic Cooperation in Merger Investigations

Page 9

Key Merger Enforcement Lessons from H&R Block and AT&T

Page 14

The Antitrust Counselor

ABA SECTION OF ANTITRUST LAW

Promoting Competition Protecting Consumers

Vol. 6.1 | March 2012

The Newsletter of the ABA Section of Antitrust Law's Corporate Counseling Committee

# Antitrust Agencies Action in 2012: A Look Ahead by Assessing the Year Behind

**Deborah Feinstein and Andrew Macurdy**

An election year is always an interesting time in Washington, D.C. The gridlock in Washington is generally worse during election season, affecting agencies throughout the federal government. And that is certainly true of the antitrust enforcement agencies. The FTC is currently operating with only four Commissioners. A fifth Commissioner, Maureen Ohlhausen, former Director of FTC's Office of Policy Planning, now in private practice, was nominated in July, but has yet to be confirmed. The DOJ Antitrust Division has been headed by Acting Assistant Attorney General Sharis Pozen, since August; she has announced that she will step down at the end of April. Bill Baer, currently at Arnold & Porter, and Director of the Bureau of Competition during the Clinton administration, has been nominated by President Obama to serve as AAG, but it is unclear when Congress will act upon his nomination.

In the meantime, however, the agencies continue with existing leadership to be active, particularly in challenging mergers. As has typically been the case, many merger challenges were resolved at both agencies through consent decrees. But what made 2011 stand out was the extent of litigation activity. The merger enforcement highlights from 2011 and what they might mean for 2012 are set forth below.

The DOJ's 2011 actions included an enforcement action against AT&T's acquisition of T-Mobile that led to the deal's abandonment, and the DOJ's first merger victory in about a decade. For the FTC, it was a year of both losses and victories. The FTC's actions were focused on the health care sector. While the FTC Chairman has made health care a priority, the large number of health care cases is largely a function of the industry's significant role in the U.S. economy and the fact that economic challenges – especially for hospitals – are driving them to combinations. In a time when the Agencies and some courts have suggested an increased role for evidence of a transaction's direct effects, this past year's challenges and court decisions made clear the continuing relevance of traditional market definition.

1 *Visit our committee's website at http://apps.americanbar.org/dch/committee.cfm?com=AT304000*

**Merger Trends at DOJ**

The DOJ ended 2011 with a high-profile win, as AT&T abandoned its attempted $39 billion purchase of T-Mobile. The DOJ's lawsuit, filed in August, coupled with pressure from the Federal Communications Commission, caused AT&T to walk away from a deal that would have created the nation's largest cell phone service provider and to pay T-Mobile $4 billion in break-up fees.

In October 2011, the DOJ scored its other major victory in a suit to block H&R Block's acquisition of TaxACT, its first merger trial in seven years and its first success in even longer. The district court enjoined the transaction on the grounds that it would create an anticompetitive duopoly in the "digital do-it-yourself" tax preparation software market.[1] After a lengthy discussion defining the relevant market, the court found that the government had established a *prima facie* case, based on market concentration data.[2]

This decision focused on product market definition, rather than turning directly to competitive effects analysis, as the *Whole Foods* court of appeals decisions and the 2010 Merger Guidelines might suggest. The court held that other forms of tax preparation, such as the pen and paper method, did not constrain the price of "digital do-it-yourself" tax preparation software. While the DOJ and FTC Guidelines highlighted the agencies' use of the "upward pricing pressure model," an economic model that abandons market definition to look at direct effects, *H&R Block* gave it a mere footnote mention. Nevertheless, both sides did use economic models in an attempt to show the extent of switching that would occur in the event of a price increase, and the court favored the government's model. Thus, *H&R Block* shows that the DOJ will challenge anticompetitive mergers and that it is capable of winning – by means of old fashioned market definition *and* newer economic tools.

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The DOJ began 2012 by approving Google's high-profile $12.5 billion purchase of U.S. cell phone maker Motorola after issuing a second request for information. The Agency's scrutiny focused mainly on Motorola's significant number of patents; it concluded that transfer of ownership to Google would not lessen competition in the consumer electronics market. At the same time, it cleared the acquisitions by Apple Inc., Microsoft Corp. and Research in Motion Ltd. of certain Nortel Networks Corporation patents, and the acquisition by Apple of certain Novell Inc. patents. In an unusually lengthy statement covering all these investigations, DOJ noted that: "The division took into account the fact that during the pendency of these investigations, Apple, Google and Microsoft each made public statements explaining their respective SEP licensing practices."[3] DOJ did not, however, require that those practices be codified in a consent decree.

**Merger Trends at the FTC**

The year of ups and downs for the FTC began with a loss. In February 2011, the FTC lost its bid for a preliminary injunction halting Laboratory Corporation of America's ("LabCorp") acquisition of newly bankrupt rival clinical laboratory testing company, Westcliff Medical Laboratories. Although the court noted that Westcliff's financial distress would factor into a balancing of the equities,[4] the decision did not reach that far as the injunction was denied based on market definition. The FTC defined the market as "capitated" laboratory testing services, arrangements between laboratories and doctor groups that charge groups on a monthly per-physician basis, to the exclusion of fee-for-service laboratories.[5] The court disagreed and stated that alternative payment methods do not sort identical products into separate markets.[6] Interestingly, Commissioner Rosch voted against an

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1 United States v. H&R Block, Inc., No. 11-00948, 2011 WL 5438955, at *47 (D.D.C. Nov. 10, 2011).
2 *Id.*at *28 – 29.
3 Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc., and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd., February 13, 2012, available at: http://www.justice.gov/atr/public/press_releases/2012/280190.htm.
4 F.T.C. v. Lab. Corp. of America, No. SACV 10-1873, 2011 WL 3100372, at *23 (C.D. Cal. Mar. 11, 2011).
5 *Id*. at *3.
6 *Id.* at *18.

enforcement action, also believing that the market definition proposed by staff would not hold.[7] Significantly, although the court acknowledged that the "Agencies' analysis need not start with market definition,"[8] it promptly began its conclusions by stressing market definition's analytical importance.[9] The FTC subsequently withdrew its *LabCorp* appeal before the Ninth Circuit and closed the pending administrative hearing.

The FTC rebounded in March 2011 with its first court victory in a preliminary injunction action against a hospital merger in over a decade. ProMedica and St. Luke's Hospital, the defendants, conceded that the relevant markets were general acute hospital care and obstetrics services in Lucas County, Ohio.[10] The opinion made the decision appear an easy one, as pre-merger conversations between the hospitals evidenced an intent to increase prices by double digits.[11] Nine months later, in December, an administrative law judge ruled for the FTC and ordered ProMedica to divest St. Luke's.[12] The decision is pending before the full Commission.

The same week the FTC prevailed in its hearing against ProMedica, it also suffered a defeat with respect to Georgia-based Phoebe Putney Health System's combination with Palmyra Park Hospital. The Eleventh Circuit unanimously affirmed the lower court's holding that the proposed acquisition of a for-profit hospital, Palmyra, by a county hospital authority, and its subsequent lease to a private entity, Phoebe, was immune from antitrust challenge under the state action doctrine.[13] The Hospital Authority of Albany-Dougherty County, Georgia, operates Phoebe and is authorized by state law to acquire other hospitals; accordingly, the Eleventh Circuit ruled any anticompetitive effects irrelevant, despite the subsequent lease to the for-profit Phoebe.[14]

In another action within the health care sector, the FTC in January 2012 decided not to pursue Supreme Court review of the Eighth Circuit's *Lundbeck* decision, despite calling the result "profoundly wrong."[15] The FTC charged the defendant drug maker with acquiring rights to the only two drugs that treat a fatal birth defect and then raising prices for the drugs nearly 1,300 percent. Again, market definition was at the forefront; the district court ruled that the FTC did not satisfy its burden of proving the drugs were in the same market,[16] relying on testimony from doctors that they would not consider price in choosing between the two drugs.[17] The Eighth Circuit affirmed on the narrow grounds that the lower court's factual determination was not "clearly erroneous."[18] [The FTC then closed the case, although one Commissioner dissented and faulted the district court with overemphasizing cross-price elasticity of demand to the exclusion of important non-price considerations.[19]] In choosing not to appeal *Lundbeck*, the FTC declined an opportunity to solicit the Supreme Court to clarify modern merger law.

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Two current FTC merger cases warrant attention. First, the FTC is presently reviewing Express Scripts' planned $29 billion acquisition of rival Medco Health Solutions, after issuing a second request in September 2011. The proposed merger would create the nation's largest pharmacy benefits manager, commanding a third of the prescription drug market, and leave CVS Caremark as the only national competitor. The FTC's investigation will likely focus on whether the relevant

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7 *Id*. at *6.
8 *Id*. at *14.
9 *Id*. at *17 – 21.
10 F.T.C. v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *54 – 55 (N.D. Ohio Mar. 29, 2011).
11 *Id*. at *16.
12 In the Matter of ProMedica Health Sys., Inc. No. 9346, 2011 WL 2415402 (F.T.C.), at *33 (May 24, 2011).
13 F.T.C. v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1376 (11th Cir. 2011).
14 *Id*. at 1376 – 78.
15 Statement of Chairman Leibowitz, Commissioner Ramirez, and Commissioner Brill *F.T.C. v. Lundbeck* (Jan. 12, 2012) *available at* http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-jdl-brill-ramirez.pdf.
16 F.T.C. v. Lundbeck, Inc., No. 08-6379, 2010 WL 3810015, at 21 (D. Minn. Aug. 31, 2010).
17 *Id*. at *19 – 21.
18 F.T.C. v. Lundbeck, Inc., 650 F.3d 1236, 1242 (8th Cir. 2011).
19 Statement of Commissioner J. Thomas Rosch in *F.T.C. v. Lundbeck*, at 2 (Jan. 20, 2012), *available at* http://ftc.gov/os/closings/publicltrs/120120lundbeck-rosch.pdf.

competition should be defined narrowly to include only companies with national reach, or more broadly to encompass regional managers.

Also pending is a court challenge, before the same Minnesota jurisdiction that decided *Lundbeck*, to Graco's acquisition of Illinois Tool Works' finishing division. The FTC alleges the combination would reduce competition in the national market for industrial liquid-finishing equipment and the market for circulation pumps. While the FTC has pressed for a very expedited hearing, arguing that the real trial is before the FTC's administrative law judge, the defendants requested a more fulsome hearing. That preliminary decision could have a significant effect on the ultimate outcome of the case.

The past year's developments suggest more rigorous enforcement priorities in the merger area by the Agencies. Major victories, such as *AT&T, H&R Block* and *ProMedica*, show that the Agencies will bring challenges they believe in – and can win in court. Yet, the Agencies' recent successes are not without exceptions, as the FTC's setbacks this past year indicate. Moreover, as the *Lundbeck* case's closing implies, the Agencies' worry about losing cases – and the long-term precedent such losses have. Finally, given decisions like *LabCorp* and *H&R Block*, the most significant takeaway from 2011 may be that despite earlier predictions of its death, market definition is alive and well.

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