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Buyer Beware: FTC Orders Unwinding of a Consummated Transaction

November 7, 2019

What happened?

On November 6, 2019, the Federal Trade Commission ("FTC") voted 5-0 to uphold Administrative Law Judge D. Michael Chappell's initial decision that Otto Bock HealthCare GmbH's ("Otto Bock") acquisition of rival Freedom Innovations LLC ("Freedom") substantially lessened competition in the market for microprocessor-driven prosthetic knees. Finding that the acquisition already has lessened competition and likely will lead to higher prices and less innovation, the Commission ordered Otto Bock to sell the majority of the Freedom assets to an FTC-approved buyer.

Otto Bock completed its acquisition of Freedom in September 2017. The transaction was not subject to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), and the FTC did not become aware of the transaction until after it had closed. "The Commission is committed to ensuring competitive markets for the benefit of consumers, and there will be times when it has to act after a merger has been consummated," stated FTC Chairman Joseph J. Simons. "The goal is always to restore the lost competition." The FTC's order represents the first time that the current Commission ordered that a consummated transaction be unwound.

Why does this matter?

The Otto Bock decision is a firm reminder to parties that, although unraveling a consummated deal is a relatively uncommon remedy, post-merger challenges are a tool that regulators will use when they believe it is warranted. The FTC and the Antitrust Division of the U.S. Department of Justice ("DOJ") prefer to challenge transactions before they close because it can be difficult to "unscramble the eggs" after a deal closes, especially if there has been significant integration. However, post-merger challenges have occurred increasingly in recent years, and agency challenges to consummated mergers are far more likely to result in litigation than challenges to unconsummated mergers.[1]

[1] See "Consummated Merger Challenges – The Past Is Never Dead," Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, before the ABA Section of Antitrust Law Spring Meeting, dated March 29, 2012, available at https://www.ftc.gov/sites/default/files/documents/public_statements/consummated-merger-challenges-past-never-

Both the FTC and DOJ have good track records when litigating against completed acquisitions.

- In December 2017, the DOJ announced a settlement with TransDigm Group, Inc. that required TransDigm to divest certain airline passenger restraint businesses that it had acquired from Takata Corporation earlier in February 2017 in a transaction that was not reportable under the HSR Act.
- In September 2017, the DOJ sued Parker-Hannifin Corporation and CLARCOR Inc., seeking a court order to partially unwind Parker-Hannifin's $4.3 billion acquisition of CLARCOR. Although the parties filed HSR, the DOJ did not sue until after consummation when it became aware of overlaps in aviation fuel filtration systems through post-merger customer complaints. The DOJ announced in December 2017 a settlement with Parker-Hannifin that required divestiture of the fuel filtration assets to a DOJ-approved buyer.
- In 2017, the FTC challenged Mallinckrodt Pharmaceutical's consummated acquisition of Synacthen Depot, a product that potentially competed with a product of Questcor Pharmaceuticals, Inc., a subsidiary of Mallinckrodt. To settle the allegations, Mallinckrodt agreed to pay $100 million in equitable relief and to sublicense Synacthen Depot for certain medical purposes.
- In November 2016, Valeant Pharmaceuticals International, Inc. agreed to divest Paragon Holdings I, Inc. to settle the FTC's charges that Valeant's May 2015 acquisition of Paragon eliminated competition between the parties for the sale of FDA-approved polymer discs used to make rigid gas permeable contact lenses. Valeant also agreed to divest to Paragon the assets of Pelican Products LLC, a contact lens packaging company that Valeant acquired after its purchase of Paragon, that is the only producer of FDA-approved vials used for shipping some gas permeable lenses.
- In April 2014, the DOJ reversed the nonreportable acquisition by Bazaarvoice of PowerReviews, a rival in the market for online reviews and ratings.
- In January 2014, after a five-year dispute, the FTC unwound Polypore International Inc.'s nonreportable acquisition of Microporous Products L.P., a rival manufacturer of battery components.
- In March 2013, the FTC filed a joint complaint with the Idaho Attorney General challenging St. Luke's Health System's acquisition of Saltzer Medical Group. The federal district court held that the acquisition violated Section 7 of the Clayton Act and the Idaho Competition Act, and

dead/120329springmeetingspeech.pdf. Former Commissioner Rosch speculates that "merging parties are more willing to litigate because there is more at stake in a consummated merger due to the greater cost to unwind a consummated deal relative to an unconsummated transaction," and, from the agencies' perspective, it is easier to try a consummated merger case because "there is less need to predict or speculate; one can determine what actually happened post-merger."

ordered St. Luke's to fully divest itself of Saltzer's physicians and assets. The Ninth Circuit affirmed the district court ruling.

- In 2012, the FTC ordered ProMedica Health System, Inc. to divest St. Luke's Hospital in Lucas County, Ohio, to an FTC-approved buyer in order to restore competition in general acute-care and inpatient obstetrical services. ProMedica appealed to the Sixth Circuit, which upheld the Commission's Order, and then to the U.S. Supreme Court, which declined review.

These examples provide a reminder that parties to proposed transactions should not assume that, just because an HSR filing is not required, consideration of antitrust issues is unnecessary. Parties to a transaction should seek the advice of experienced antitrust counsel early in the process to address potential antitrust risks, even if the transaction is not reportable under the HSR Act. When a nonreportable merger is likely to raise significant antitrust issues or result in significant customer complaints, the parties should assess the risk of a post-consummation merger challenge and consider mitigating that risk by proactively raising potential overlaps with agency staff before closing.

How can Cadwalader help?

Cadwalader's antitrust team, located in key jurisdictions in the United States (New York, Washington, DC, Charlotte) and Europe (London, Brussels), is composed of specialists in offering 'end-to-end' advice on compliance, investigations and related litigation. Our practitioners are experienced in assessing and addressing potential antitrust risks with regard to proposed transactions, implementing effective HSR compliance programs and conducting trainings on regulatory requirements.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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