Consummated Merger Challenges – The Past Is Never Dead

the FTC seeks for consummated mergers. Finally, I'll address some criticisms regarding the way the FTC reviews consummated mergers.

I.A.

Since the premerger notification filing thresholds substantially increased in 2001, both agencies have investigated and challenged a number of consummated mergers. During the Bush administration, the FTC and DOJ together challenged eighteen consummated mergers.[1] During Chairman Leibowitz's term, which began in March 2009, the FTC has challenged nine consummated transactions.[2] Consummated merger challenges made up about one-fifth of our total merger challenges during that time.[3]

Agency challenges to consummated mergers are far more likely to result in litigation than challenges to unconsummated mergers. Four of the nine consummated merger challenges under our current Chairman resulted in litigation;[4] the remaining five resulted in consent decrees without litigation.[5] In other words, almost half of the FTC's challenges to consummated mergers resulted in litigation. In contrast, only 6 of the 39 challenges to unconsummated mergers resulted in litigation; the other 33 resulted in consents. Why do we see this difference? Arguably, the 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

[1] *See* Ilene Knable Gotts & James F. Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, Competition Pol'y Int'l, Spring 2009.

[2] *See* notes 4 and 5 *infra*.

[3] The FTC challenged a total of 48 mergers during that time. $^{9}/_{48} = 0.1875$.

[4] These were Carillion/CAI (2009), D&B/QED (2010), LabCorp/Westcliff (2010), and ProMedica/St Luke's (2010). The parties in Carillion/CAI and D&B/QED entered into a consent agreement prior to resolution of the litigation.

[5] These were Houghton/Stuart (2010), Fidelity/LandAmerica (2010), Nufarm/A.H. Marks (2010), Topps/Penn Traffic (2010), and Cardinal Health/Biotech (2011).

unconsummated transaction. From Complaint Counsel's perspective, it's easier to try a consummated merger case because there is less need to predict or speculate; one can determine what actually happened post-merger.

To illustrate, in 2004, the Commission issued an administrative complaint against Evanston Northwestern Healthcare Corporation, challenging its 2000 acquisition of Highland Park Hospital.[6]

two drugs for reasons other than price. The Eighth Circuit affirmed on the basis that the district court's conclusions with respect to the relevant market were findings of fact that were entitled to deference on appeal. Contrary to my wishes,[12] the Commission decided not to seek certiorari to

the acquired company to an FTC-approved buyer within six months. Polypore appealed the Commission's decision to the Eleventh Circuit. Oral argument was held in January, and we expect a decision from the court any day. I will not say any more about this case except to note that I issued a separate statement observing that because it was a consummated transaction, we could focus on what actually happened instead of predicting what might happen after the transaction closed.[16]

I.B.

In January 2011, the Commission filed an administrative complaint in Part 3 challenging the transaction, and, along with the State of Ohio, also sought a preliminary injunction in federal district court seeking an order requiring ProMedica to preserve St. Luke's as a separate, independent competitor during the FTC's administra

and that competitors would not be able to reposition. I issued a concurring statement taking issue with the majority's product market de

and require LabCorp to maintain WestCliff's assets pending the outcome of the administrative proceeding.[23]

In February 2011, the District Court for the Central District of California denied the FTC's request for a preliminary injunction.[24] The court held that the FTC's alleged product market was too narrow, that there were many competitors in the proper relevant market, that entry was easy, and that the private equities were significant on account of Westcliff's precarious finances. The FTC sought a stay pending appeal but was denied by both the district court and Ninth Circuit.[25] As a result, the Commission withdrew its appeal and terminated the Part 3 administrative litigation.

II.

Next, I'd like to describe the sources of evidence we use in a consummated merger and how they differ from unconsummated mergers.

The 2010 Merger Guidelines for the first time address the topic of consummated mergers. Section 2.1.1 of those Guidelines states that the antitrust agencies "consider the same types of evidence they consider when evaluating unconsummated mergers." However, that section also

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[23] I dissented from challenging the transaction, explaining that even though I believed there was "reason to believe that this transaction [would] have anticompetitive effects, I cannot support a complaint that alleges an erroneous definition of the relevant product market." Dissenting Statement of Commissioner J. Thomas Rosch in the Matter of Laboratory Corporation of America and Laboratory Corporation of America Holdings, FTC Docket No. 9345, File No. 101 0152 (Nov. 30, 2010), *available at* http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdisstatement.pdf.

[24] *FTC v. Lab. Corp. of America*, Case No. SACV 10-1873 AG (MLGx), 2011-1 Trade Cas. (CCH) ¶ 77,348, 2011 U.S. Dist. LEXIS 20354 (C.D. Cal. Feb. 22, 2011).

[25] *FTC v. Lab. Corp. of America*, No. 11-55293 (9th Cir. Mar. 14, 2011), *available at* http://www.ftc.gov/os/caselist/1010152/110314labcorporder-cca.pdf ("Appellant's opposed emergency motion for injunctive relief is denied."); FTC v. Laboratory Corp. of America, Case No. SACV 10-1873 AG (MLGx), 2011-1 Trade Ca

states that "[e]vidence of observed post-merger price increases or other changes adverse to customers is given substantial weight." In fact, if the reviewing agency determines that these changes resulted from the merger, "they can be dispositive" and the decision of whether to challenge the transaction may be at an end. An implication of this is that the agencies might not bother to define the relevant market or determine concentration levels when there is evidence of actual anticompetitive effects from a consummated transaction.[26]

This section of the new Guidelines, as well as other language endorsing the use of direct effects evidence, is one of the principal advancements in the 2010 Guidelines, in my judgment. This type of evidence offers a number of advantages over inferences drawn from market definition and concentration. Market definition, of course, is not an end in itself but rather an indirect means of determining the presence of market power or the likelihood that it will be exercised. Focusing on market definition risks obscuring the ultimate question under Section 7 of the Clayton Act, which is whether the transaction is likely to substantially lessen competition. The answer to that question may turn on market definition, but it doesn't have to.

Another benefit of looking first to any actual anticompetitive effects is its potential to help define the relevant market. I have described this as "backing into" the market definition. Others have described competitive effects and market definition as "two sides of the same coin."[27] Both mean the same thing to me: the relevant market can sometimes be defined through the competitive effects evidence.

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[26] *See also* 2010 Merger Guidelines § 4 ("Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.").

[27] Brief of Appellant at 38,

I also think a focus on actual anticompetitive effects is an easier story for a court to understand.[28] A case focused on market definition risks getting bogged down in esoteric fights over critical loss analysis or the SSNIP test. In contrast, a court is likely to be persuaded that a merger that resulted in a price increase violates Section 7, even if the court harbors some doubts about the precise relevant market.

The FTC has, in fact, placed weight on evidence of actual anticompetitive effects in its recent consummated merger challenges. For example, in *Lundbeck*, the agency presented evidence that shortly after the transaction was consummated, prices increased nearly 1,300 percent.[29] In *Evanston*, the Commission found that the merged firm raised its prices to managed care organizations immediately after consummation of the transaction. This finding was consistent with post-merger business documents from Evanston.

Nevertheless, the Commission has not yet gone as far as the 2010 Guidelines would suggest in terms of moving away from an upfront structural case and toward the use of direct evidence of a merger's anticompetitive effects. Perhaps the best example of that is the Commission's December 2010 opinion in the *Polypore* case.[30]

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[28] *See generally* Vaughn R. Walker,

Polypore, as I've said, involved a consummated merger that resulted in significant price increases.[31] There was also compelling evidence in *Polypore* that the transaction was motivated by an expectation of reduced competition and higher prices. The Commission's decision acknowledged that both the courts and the Commission have recognized that the traditional burden-shifting framework that begins with defining the relevant market "does not exhaust the possible ways to prove a § 7 violation on the merits."[32] The opinion also stated that "[i]n a consummated merger, post-acquisition evidence of actual anticompetitive harm may in some cases be sufficient to establish Section 7 liability without separate proof of market definition."[33] Nevertheless, the Commission's opinion embraced a traditional analytical framework, including precise upfront market definition, before turning to consideration of the transaction's competitive effects.[34]

As I said, I wrote a concurring opinion praising the rigor of the Commission opinion but lamenting that the Commission had declined to take the opportunity to apply the advances in the

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As I pointed out in my concurring opinion, "when a merger has been consummated and the evidence shows it has had actual anticompetitive unilateral effects, the law allows liability to be established by direct evidence of those effects, without initially defining a relevant market using Merger Guidelines methodology, at least where, as here, the evidence of anticompetitive effects identifies the 'rough contours' of the market." Concurring Opinion of Commissioner J. Thomas Rosch at 8, Evanston Northwestern Healthcare Corp., Docket No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf.

[31] Opinion of the Commission, Polypore Int'l, Inc., Docket No. 9327 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeopinion.pdf.

[32] *Id*. at 11 (quoting *FTC v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.)).

[33] *Id*.

[34] *Id*. ("Both Complaint Counsel and Respondent developed their evidence and litigated this case by reference to a relevant market and this traditional burden-shifting framework. The ALJ relied on the same legal framework in the ID. We find that this framework illuminates the factual record and competitive issues in this case and therefore apply it in this opinion."). The same can be said for the Commission's decision in *Evanston*.

2010 Guidelines. I explained that "especially where, as here, the merger at issue is consummated, it is generally preferable to determine whether a merger has had anticompetitive effects by reference to the parties' motives for the transaction and the actual effects resulting from the merger instead of trying first to define with precision the dimensions of relevant market."[35]

Of course, the FTC may challenge a consummated merger even without evidence of higher prices, lower output, or other anticompetitive effects from the merger. As the 2010 Guidelines note, "a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct."[36] In the FTC's federal court challenges to the LabCorp/Westcliff and ProMedica/St. Luke's transactions, for example, the agency did not cite to any evidence of actual anticompetitive effects from the transactions in the complaints. This was hardly surprising, given that these litigations began just a few months after the transactions closed and that the parties were aware of the FTC's investigation at the time of closing.

III.

Next, I'd like to discuss how the FTC should litigate consummated merger cases.[37] To begin with, we should ask ourselves how the top plaintiffs' trial lawyers try their cases and why they try them that way. We can learn something from them.

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[35] Concurring Opinion of Commissioner J. Thomas Rosch at 5, In re Polypore Int'l, Inc., Docket No. 9327 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeconcurringopinion.pdf.

[36] 2010 Merger Guidelines § 2.1.1.

[37] My views on the proper way to litigate an antitrust case are described in more detail in J. Thomas Rosch, Comm/r, Fed. Trade Comm'n, Can Antitrust Trial Skills Really Be "Mastered"? Tales Out of School About How to Try (or Not to Try) an Antitrust Case, Remarks Before the

First, the best plaintiffs' lawyers consider it imperative to tell a short but comprehensible story. For this reason, in closed-door Commission meetings to consider a complaint recommendation, we've taken to pressing the staff litigating a case to spell out in detail what the storyline at trial will be before we'll agree to vote out a complaint. If the lead attorney can't summarize a compelling storyline that plays up our strengths and responds to our weaknesses in a few concise sentences, then we won't vote out the complaint. It's as simple as that.

Second, the best trial lawyers also do a terrific job of figuring out *how* to tell that story – in other words, which witnesses and documents will be the most persuasive. They rely on adverse witnesses' documents and other statements. In fact, they almost always begin their cases by calling as witnesses the opposing party's CEO or Chairman. One benefit to this approach is that is that these key witnesses are in a defensive posture from the get-go and are unable to lead off with a canned explanation for why the transaction is procompetitive. Starting with the defendant's senior executives is also useful because they are hostile witnesses, so the agency can cross-examine them and control the testimony.

Great trial lawyers do not rely on customer witnesses or on other third party witnesses except as frosting on the cake; much less do they rely on affidavits from those witnesses to make their cases. Why is that? Customer and competitor witnesses are not easy to control, for one thing.[38] In addition, courts sometimes perceive that customers have a built-in bias against mergers. Also, it's difficult to present customer testimony in a fashion that is not cumulative, on

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ABA Antitrust Masters Course (Sept. 30, 2010), *available at* http://www.ftc.gov/speeches/rosch/100930roschmasterscourseremarks.pdf.

[38] Customer witnesses cannot ordinarily be led or otherwise cross-examined once they have been interviewed by counsel because they are not hostile witnesses.

the one hand, and is representative, on the other hand.[39]

Notwithstanding this strong preference for structural relief, in the *Evanston* case, the Commission declined to require divestiture of Highland Park, the acquired hospital, and instead imposed a conduct remedy. The Commission opinion pointed to four factors that led it to this conclusion:

> "A long time elapsed between the closing of the merger and the conclusion of the litigation";
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> Evanston had integrated the operations of Highland Park with two other local Evanston hospitals;
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> Some of the post-merger improvements at Highland Park would not survive a divestiture; and
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> These post-merger improvements would take a long time for Highland Park to recreate on its own after a divestiture.[41]

The Commission pointed to two significant post-merger improvements at Highland Park that were at risk in the event of a divestiture: the cardiac surgery program and a state-of-the-art electronic medical records system. Without the other Evanston hospitals, it was not clear that Highland Park would have the volume that it needed to maintain its cardiac surgery program. Loss of this program would have also put at risk Highland Park's interventional cardiology services. In addition, the Commission was concerned about the effect of divestiture on Highland Park's ability to deploy a modern medical records system. It likely would have taken considerable time and expense for Highland Park to deploy its own medical records system and the switchover could have compromised patient care.

As a result, the Commission rejected divestiture as a remedy and instead required Evanston to establish a separate negotiating team for Highland Park to compete for payors'

[41] Opinion of the Commission at 88-91, Evanston Northwestern Healthcare Corp., Docket No. 9315, 2007 FTC LEXIS 210 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

In addition, *every one*

to grant extensions to third parties to comply with compulsory process, which further delays completing the investigation.

Although I don't have any hard data on this, it wouldn't surprise me if investigations of consummated mergers at the FTC take on average twice as long to complete as investigations of unconsummated mergers. Protracted investigations are problematic for several reasons. First, we need to challenge and unwind anticompetitive transactions as quickly as possible to minimize consumer injury. The longer we wait, the greater the problem of "unscrambling the eggs" becomes. Second, lengthy investigations can lead to uncertainty in the marketplace. Customers, vendors, and even employees may go elsewhere out of a fear that the merged entity will be broken up, even if, ultimately, the agency concludes there is no violation. Third, the merged entity itself may react to an extended investigation by pulling some of its competitive punches in the marketplace. Curtailing competition on the merits is the last thing the Commission wants to do. Fourth, extended investigations (of any kind) can cause significant financial and manpower burdens not only on targets of the investigation but also on third parties subject to compulsory process.

It would be unfair, however, to point the blame for these problems solely at our staff. In a consummated merger investigation, the respondent sometimes has nothing to gain from a rapid conclusion to the investigation. Thus, we sometimes see attorneys engaging in delaying tactics or providing incomplete responses to compulsory process. At times, we have had to resort to enforcement actions in district court to ensure compliance with compulsory process.

To some extent, I also blame the Commission itself. Although the Commission has reformed our Part 3 rules to expedite administrative hearings,[48] we haven't made similar changes