Antitrust Update

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July 14, 2006

Recent Developments in Antitrust Law

We report three significant developments in antitrust law which have occurred since our last update in late April. As described below, the Federal Trade Commission ("FTC") recently challenged a consummated transaction that was not reportable under the Hart-Scott-Rodino Act. In addition, the Supreme Court issued writs of certiorari in two antitrust cases-one which concerns the pleading standards for alleging an antitrust conspiracy and one which considers the appropriate standard for finding a violation of Section 2 of the Sherman Act for "predatory overbidding."

FTC Challenges a Closed Acquisition Not Reportable under Hart-Scott-Rodino

On July 7, 2006, the FTC announced its challenge to a consummated transaction in which Hologic acquired Fischer Imaging Corporation. Hologic was a competitor of Fischer in the sale of prone stereotactic breast biopsy systems (SBBSs)-integrated systems used by doctors to conduct breast biopsies. The acquisition closed in September 2005 and was valued at $32 million, well below the $56.7 million reporting threshold under the Hart-Scott-Rodino Premerger Notification Act.

In its complaint, the FTC alleges that Fischer was Hologic's only significant competitor in the SBBS market in the United States and that the transaction eliminated this competition. The complaint alleges that, as a result of the acquisition, Fischer exited the mammography and breast biopsy businesses and planned to terminate its remaining operations within a few months. Hologic's strong and broad patent portfolio also allegedly presents "significant" barriers to new entry. Accordingly, the complaint alleged that the acquisition significantly increased concentration in an already highly concentrated market, allowed the combined firm to unilaterally raise prices, and reduced incentives to innovate.

To remedy the alleged competitive harm, the Commission's proposed order requires Hologic to divest all of Fischer's prone SBBS-related assets to Siemens AG. The order is subject to public comment until August 5, 2006.

This case is significant because it illustrates two important points. *First*, the antitrust agencies' authority to challenge a transaction does not end with closing-instead, the authorities still have the authority to challenge a deal post-consummation. *Second*, the antitrust authorities are not limited to challenging mergers and acquisitions that are subject to the HSR Act-instead, the agencies have the authority to challenge transactions irrespective of size or reportability.

Supreme Court Will Consider the Standard for Sufficient Pleading of an Antitrust Conspiracy

On June 26, 2006, the Supreme Court granted a petition for writ of certioriari in *Bell Atlantic Corp. v. Twombly*, a case addressing pleading standards for conspiracy claims under Section 1 of the Sherman Act. The Supreme Court's ruling will clarify the extent to which a plaintiff must allege "plus factors" which tend toward conspiracy, in addition to simply alleging parallel conduct amongst the alleged conspirators and their participation in the alleged conspiracy.

In *Twombly*, the plaintiffs alleged that AT&T, Qwest, BellSouth, and Verizon violated Section 1 of the Sherman Act by conspiring to not compete for local telephone and high-speed Internet in each other's traditional geographic markets and by preventing new competitors from entering those markets through violations of their obligations under the Telecommunications Act of 1996 to provide potential new entrants access to the incumbent's network at "just, reasonable, and nondiscriminatory" rates. The plaintiffs did not allege any specific facts to show the formation of an agreement, nor did they allege any "plus factors" to infer a conspiracy existed. Instead, the plaintiffs asserted that the defendants engaged in parallel conduct and that such conduct resulted from a conspiracy.

The district court dismissed the compliant and found the plaintiffs' allegations that the defendants' conduct exhibited "conscious parallelism" insufficient to support their claims of conspiracy, instead requiring plaintiffs to allege at least one "plus factor" indicating that the parallel behavior could not be explained by the defendants' independent self-interest.

On appeal, the Second Circuit overruled the district court, holding that the plaintiffs' allegations sufficiently gave "fair notice of what the claim is and the grounds upon which it rests" and refusing to hold antitrust conspiracy claims to the heightened pleading requirements typically applicable to claims of fraud or violations of specific statutory requirements..

The Supreme Court's ultimate decision should clarify the pleading requirements for future antitrust claims.

Supreme Court Will Consider Whether the Burden of Proof in Predatory Pricing Claims Applies Equally to Predatory Overbidding

Also on June 26, 2006, the Supreme Court issued a writ of certiorari in *Weyerhaeuser Comp. v. Ross-Simmons Hardwood Lumber Co.* In that case, plaintiffs alleged "predatory overbidding" by the defendants which was intended to, and did have the effect of, eliminating competition by raising their rivals' costs, in violation of Section 2 of the Sherman Act. Weyerhaeuser was alleged to have "overbid" for sawlogs, which overbidding increased the prices of sawlogs to a level which drove plaintiffs out of business.

At issue in the case is whether the *Brooke Group* prerequisites for sell-side predatory pricing liability-showing both (i) below-cost pricing and (ii) a "dangerous probability" of recouping those losses-should also apply to predatory overbidding. At trial, the district court instructed the jury that it could find a Sherman Act violation for predatory overbidding simply by finding that Weyerhaeuser purchased more logs than required and paid higher than "necessary" prices, in order to prevent plaintiffs from obtaining a "fair" price for sawlogs. The jury so found and awarded plaintiffs over $78 million in treble damages. The Ninth Circuit affirmed the jury instructions.

On appeal, defendants argued that the *Brooke Group* standard should be applied in cases of alleged overbidding just as it applies in cases of sell-side predatory pricing. Under that standard, defendants charged with overbidding would be liable only if they operated at a loss and had a "dangerous probability" of recouping that loss. The Ninth Circuit rejected the argument that predatory overbidding cases should be subject to the *Brooke Group* predatory pricing standard noting that, unlike in overbidding, consumers benefit, at least temporarily, from predatory pricing.

The Department of Justice and the FTC submitted *amicus briefs* supporting Weyerhaeuser's argument, arguing that the Ninth Circuit's decision could actually chill pro-competitive behavior. The agencies expressed concern over the vague standards of "fairness" and "necessity," noting that any firm who can affect prices by increasing purchases must now take into account the possibility that less-efficient rivals might succeed in a predatory overbidding claim by convincing a jury that it paid more than "necessary" for inputs so as to deprive those rivals of a "fair" price. This might, in turn, discourage firms from increasing output, especially in markets with inelastic supply.

If you have any questions regarding the above, do not hesitate to call any of the persons listed below.

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