



Year in Review: Merger Control in the U.S.

Yee Wah Chin

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U.S. Merger Year-in-Review

- Overview
- Media transactions
- Technology
- Healthcare
- Courts

Overview

- Statistics
- Types of transactions
- Remedies

Statistics

- First half of 2014 nearly \$1.8 trillion in deals reported, w/ 20 valued at >\$10 billion
- Still <4% of notified deals get 2d request
- >60% get early termination of waiting period
- March 2014 – May 2015, DOJ & FTC challenged/resolved challenges to 40 transactions
 - DOJ – 18 transactions
 - FTC – 22 transactions

DOJ

- 10 divestitures
- 6 abandoned
 - 1 post-complaint
 - 5 pre-complaint
- 2 unwound

FTC

- 17 divestitures
- 2 abandoned after FTC voted to issued complaint & seek preliminary injunction
- 1 conduct remedy
- 1 pending decision on preliminary injunction
- 1 filed May 29, 2015

Types

- All involved horizontal overlaps
- 2 also vertical aspect (Continental AG/Veyance Technologies; Par Petroleum/Mid Pac Petroleum)
- 1 w/ monopsony concerns (Tyson Foods/Hillshire Brands)

Remedies

- Divestitures before permit transaction to proceed – 27 transactions
- Unwinding of completed transaction w/ disgorgement of profits & internal antitrust training programs (Twin America LLC JV)
- Conduct remedy (Phoebe Putney)

Media

- Comcast/Time Warner Cable
- National CineMedia/Screenvision
- 3 television mergers

Comcast/Time Warner Cable

- Largest & second largest cable companies
 - Comcast - >21 million residential & business customers in 39 states & D.C.
 - TWC - ~11 million customers in parts of 39 states
 - Post-merger & post-spinoffs - ~30 million cable subscribers, <30% U.S. multichannel video program subscribers
- Largest & second largest providers of broadband cable Internet service – combined ~40%
- Interests in program networks & services
 - Regional sports networks
 - Comcast – NBCUniversal
 - TV networks, broadcast station, cable programming networks
- Deal abandoned April 2015

National CineMedia/Screenvision

- On-screen advertising networks - intermediaries between movie theaters & advertisers that create pre-show programming combining ads w/other content
- Parties only 2 significant cinema on-screen advertising networks
- Combined served almost 90% all movie theater screens through long-term exclusive contracts, resulting in monopoly in cinema advertising & preshow services.
- Internal documents indicating aggressive price competition & market is duopoly
- DOJ filed lawsuit against deal in 2014
- Deal abandoned March 2015

TV Mergers

- Sale of spot advertising in local television markets
- Rejection of “side car” divestitures
 - Divestiture buyers must be independent competitors
 - Consider certain relationships as under common economic control
- Sinclair/Perpetual
- Media General/Lin Media
- Nexstar/Communications Corporation of America

Sinclair/Perpetual

- Perpetual ABC affiliate in Harrisburg, PA compete w/ Sinclair owned/operated CBS-affiliate & CW-affiliate stations in central Pennsylvania
- Deal result in Sinclair controlling 3 of 6 broadcast stations in area
- Perpetual Harrisburg affiliate divested to independent buyer
- Charleston, SC Perpetual ABC-affiliate overlap w/ Cunningham Fox-affiliate not viewed by advertisers as close substitutes

Media General/Lin Media

- Overlap in 5 local TV markets
- Agreed up front to divest stations in affected markets to independent competitors
- Avoided second request

Nexstar/Communications Corporation of America

- Overlap in Evansville, IN
- Nexstar through Mission Broadcasting after purchase would own/control 3 stations & 3 of 4 major broadcast affiliates
- Agree to divest CCA interest in CBS & Fox affiliate stations

Technology

- Core Logic/DataQuick Information Systems
- Bazaarvoice/PowerReviews
- Embarcadero Technologies/CA
- Verisk Analytics/EagleView Technology
- Applied Materials/Tokyo Electron

Core Logic/DataQuick Information Systems

- National assessor & recorder bulk data, record data in standardized format for majority of real estate in U.S.
- Go from 3 to 2 competitors
- Core Logic license DataQuick national assessor & recorder bulk data, plus ancillary data sets, to Renwood RealtyTrac
- RealtyTrac online marketplace of foreclosure real property listing, national foreclosure data services

Bazaarvoice/PowerReviews

- Non-reportable transaction completed June 2012
- DOJ complaint filed January 2013
- January 2014 decision for DOJ following 3 week trial
 - Internal business documents characterize PowerReviews as Bazaarvoice's strongest & most credible competitor
 - DOJ economist testified that merged company had incentive & ability to raise prices
 - Customer testimony that merger caused no harm considered speculative
- Settlement April 24, 2014
 - Divestiture
 - Restore competition to status quo ante

Embarcadero Technologies/CA

- ERwin data modeling product suite
- Parties “particularly close competitors”
- ERwin vigorous competitor in functionality & pricing
- Acquisition abandoned

Verisk Analytics/EagleView Technology

- Rooftop aerial measurement products used by insurance industry to assess property damage claims
- FTC claims parties are only 2 significant competitors
- EagleView serves most of top 25 insurers
- Verisk, lower cost, best competitor on product quality, patent strength, dominant software platform to process claims, relationships w/ insurers
- Other providers distant competitors often subject to patent litigation w/ EagleView
- Transaction abandoned

Applied Materials/Tokyo Electron

- Semiconductor manufacturing equipment
- Concern re development of equipment for next-generation semiconductors
- 2 largest competitors w/ know-how, resources & ability to develop & supply high-volume non-lithography semiconductor manufacturing equipment
- April 2015 abandoned deal after DOJ rejected proposed divestiture

Healthcare

- Akorn/Hi-Tech Pharmacal
- Akorn/VersaPharm
- Prestige Brands/Insight Pharmaceuticals
- Surgery Center Holdings/Symbion
- Medtronic/Covidien
- Eli Lilly/Novartis Animal Health
- Novartis/GlaxoSmithKline – 2 deals
- Sun Pharmaceuticals/Ranbaxy Laboratories
- Impax/CorePharma
- Phoebe Putney
- Steris/Synergy Health
- FTC approach to pharmaceutical deals

Akorn/Hi-Tech Pharmacal

- Generic eye drops for bacterial infections & ulcers
- Topical anesthetic drugs
- 4->3 & 3->2
- Hi-Tech potential 4th competitor
- Divest rights & assets in 5 markets

Akorn/VersaPharm

- Generic injectable tuberculosis drug, rifampin
- 3 current approved sellers, including VersaPharm
- Akorn pending application to sell
- Divest ANDA for generic injectable rifampin to Watson Laboratories

Prestige Brands/Insight Pharmaceuticals

- Over-the-counter motion sickness drugs
- Prestige makes best selling Dramamine
- Insight makes Bonine
- Only 2 branded drugs w/ significant sales
- Divest Bonine to Wellspring Pharmaceuticals

Surgery Center Holdings/Symbion

- Multi-specialty ambulatory surgical centers in Orange City/Deltona, FL
- 2->1
- Potential to increase rates for outpatient surgical services for commercial health plans & commercially insured patients
- Divest Symbion's ownership interest in center in Orange City

Medtronic/Covidien

- Drug-coated balloon catheters to treat peripheral vascular disease
- Only C.R. Bard in market
- Medtronic & Covidien in clinical trials
- Medtronic agree to divest Covidien drug-coated balloon catheter business

Eli Lilly/Novartis Animal Health

- Medication for heartworm disease in dogs
- Lilly's Trefexis & Novartis's Sentinel
 - Only 2 administered orally monthly
 - Contain same active ingredient
 - Also treat fleas & other internal parasites
- Lilly divest Sentinel product line to Virbac S.A.

Novartis/GlaxoSmithKline

■ Consumer health care products JV

- GSK control JV (63.5%) & contribute Nicoderm CQ nicotine patch
- Novartis (36.5%) market own Habitrol nicotine patch
- Only 2 branded nicotine patches
- 2 of 3 suppliers of private label patches
- Novartis divest Habitrol business

■ Acquisition of cancer treatment drugs

- Novartis in development BRAF & MEK inhibitor drugs to treat melanoma
- Only Novartis, GSK & few others w/product in market/in development of BRAF/MEK
- 2 of 3 marketing/developing BRAF/MEK combination
- Novartis divest BRAF & MEK assets to Array BioPharma

Sun Pharmaceuticals/Ranbaxy Laboratories

- Generic minocycline tablets
- Ranbaxy one of 3 selling 3 dosage strengths of generic minocycline tablets
- Sun one of few likely to enter into market
- Divest
 - Ranbaxy interests in generic minocycline tablets,
 - Ranbaxy capsule assets
- Supply buyer w/ tablets & capsules until it establishes own manufacturing

Impax/CorePharma

- Generic pilocarpine tablets for dry mouth
 - 2 current suppliers
 - Impax & CorePharma only likely new entrants, w/ approved ANDAs
- Generic ursodiol tablets for biliary cirrhosis & gall bladder diseases
 - 4 current suppliers of generic ursodiol tablets, including Impax
 - Recent supply shortages
 - CorePharma one of few likely new entrants
- Divest CorePharma rights & assets to generic pilocarpine tablets & generic ursodiol tablets

Phoebe Putney

- Hospital Authority of Albany-Dougherty County formed under Georgia Hospital Authority Law
- Authority owned 1 of 2 hospitals in county & purchased the other hospital
- Trial & circuit courts denied injunction against transaction on ground of state action immunity
- Supreme Court reversed, 9-0, finding no immunity
- Georgia strict Certificate of Need requirements made divestiture impractical remedy
- Conduct remedy consent agreement
 - Notify FTC in advance of acquiring any part of hospital/controlling interest in other healthcare providers in area for 10 years
 - Prohibited from objecting to CON applications by potential new hospital providers in same area for 5 years

Steris/Synergy Health

- Contract sterilization services using radiation for medical devices
 - Steris gamma sterilization facilities, only 1 of 2 providers in U.S.
 - Synergy planned x-ray sterilization facilities
- May 29, 2015 – FTC issued administrative complaint & filed motion for TRO & preliminary injunction against deal

FTC Approach to Pharma

- Customers – MD, payer, patient
- Market
 - Indication specific
 - Pipeline products
 - mechanism of action
 - generic/branded – dosage sizes
- Competition
 - in innovation
 - for customers
- Divestiture common remedy

Courts

- ProMedica Health Systems v. FTC, 749 F.3d 559 (6th Cir. 2014)
- Saint Alphonsus Medical Center - Nampa v. St. Luke's Health System, 2015 WL 525540 (9th Cir. Feb. 10, 2015)
- Commonwealth v. Partners Healthcare Sys., 2015 Mass. Super. LEXIS 4 (Mass. Super. Court, Suffolk County, Jan. 29, 2015)

ProMedica Health Systems

- Bargaining dynamic between payer & healthcare provider systems
- Anchor providers in networks offered by payers to patients
- Merger of 2 of 4 hospital systems in Lucas County, Ohio
 - >50% primary & secondary services
 - >80% obstetrical services
- 2010 – FTC permitted transaction subject to hold separate pending administrative proceedings
- 2012 – FTC ordered divestiture of St. Luke’s
- 2014 – 6th Circuit denied ProMedica petition
- 2015 – petition to Supreme Court for certiorari pending

St. Luke's Health System

- Challenge by competitors, FTC & State of Idaho to St. Luke's 2012 acquisition of Saltzer Medical Group, largest independent, for-profit, physician-owned, multi-specialty group of ~44 physicians in Nampa, Idaho
- Alleged higher rates for health care services by primary care physicians will result from control of 80% of primary care & limits on physicians' ability to refer outside of St. Luke's
- 2014 – District of Idaho found antitrust violation & ordered divestiture
- 2015 – 9th Circuit affirmed

Partners Healthcare

- Largest health system & private employer in Massachusetts (10 hospitals & 6,000 physicians) to acquire 3 competing hospitals outside Boston & add 100s of doctors to network
- Settlement reached between Massachusetts Attorney General & Partners
 - Price caps
 - Non-price restrictions
- 2015 – Suffolk County Superior Court rejected settlement
 - Not in public interest
 - Could not be properly supervised & enforced



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ywchin@ingramllp.com