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Antitrust Alert

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Consummated Mergers: It Ain't Over 'Til the Fat Lady Sings

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Merging companies whose deals fall below the Hart-Scott-Rodino (HSR) merger filing threshold may think that once they have completed their merger and integration is finished, there is no longer any threat that the federal antitrust law enforcers, the FTC or DOJ, will challenge their deal. Consequently, these companies make substantial investments of time, money and other valuable resources in the merged entity that are at risk. Why? Because even consummated mergers can be challenged by the U.S. antitrust law enforcers.

This risk was underscored by a recent decision from the Eleventh Circuit Court of Appeals. In July, the Eleventh Circuit affirmed the Federal Trade Commission's decision in *Polypore*, finding that the consummated merger of two battery separator manufacturers would substantially lessen competition in violation of Section 7 of the Clayton Act, and ordering extensive divestitures.[1] In addition to demonstrating the risks that companies take when they consummate deals that have substantive antitrust problems, this decision illustrates the broad discretion the agencies enjoy in formulating remedies.

In 2010, the Commission challenged Polypore's 2008 acquisition of Microporous. After a lengthy administrative trial, the ALJ determined that Polypore's acquisition of Microporous was anticompetitive in four North American battery separator markets. Battery separators are electronic insulators placed between the charged lead plates in batteries to prevent electrical short circuits while allowing current to flow between the plates. The FTC affirmed the ALJ's finding of liability in three of the four markets, and ordered Polypore to divest the acquired company to an FTC-approved buyer within six months.

One notable aspect of the Commission's decision is that the ordered divestiture included a plant located outside of the relevant U.S. market: the Commission required Polypore to include the European plant it acquired from Microporous in the divestiture. That part of the divestiture was especially problematic for Polypore as it had closed one of its plants in Europe in anticipation of using the divested plant. The Commission's justification, which was accepted by the Eleventh Circuit, was that when Microporous produced separators for its European customers at its facilities in the United States, capacity constraints limited its ability to compete for additional business in the United States. However, if Microporous was able to use the plant in Europe to satisfy European demand, Microporous would be able to use its production facilities in the United States to supply U.S.-based customers.

For the agencies, consummated mergers can be low-hanging fruit. After a merger is consummated, the merged company may create incriminating evidence of anticompetitive conduct, such as rapid increases in prices or decreases in output. The 2010 Merger Guidelines state that the agencies give substantial weight to evidence of "post-merger price increases or other changes adverse to customers," and such evidence may even be dispositive. As such, if there is direct evidence of post-merger anticompetitive behavior or a clear monopoly resulting from the merger, as in Polypore, the agencies often have little trouble proving that a deal has had an anticompetitive effect.

Antitrust challenges to consummated mergers have increased significantly over the last several years. For example, since FTC Chairman Leibowitz's term began in 2009, the FTC has challenged nine consummated mergers, making up about one-fifth of the FTC's total merger challenges during that time, and the DOJ has gotten in on the act as well.[2]

The following summarizes some key post-consummation challenges, and the associated remedies:

- ***Election Systems & Software, Inc*** – In 2010, the DOJ filed a complaint challenging Election Systems and Software, Inc.'s 2009 acquisition of Premier Election Solutions, Inc. The complaint

alleged that the acquisition eliminated Premier as Election Systems' chief competition for voting equipment and was, therefore, anticompetitive. The parties agreed to settle the complaint and entered into a proposed judgment requiring divesture of intellectual property rights and other intangible assets relating to voting equipment, as well as assets relating to the production, assembly and maintenance of those products, and inventory and spare parts.

- ***Evanston Northwestern Healthcare Corporation*** – In 2004, the FTC issued an administrative complaint challenging Evanston's 2000 acquisition of Highland Park Hospital. By the time the FTC challenged the deal, the merging hospitals were fully integrated. Key evidence in the case included substantial evidence of significant price increases and documents which emphasized that the merger created an opportunity for the hospitals to join forces and grow together rather than compete with each other. The ALJ found that the transaction violated Section 7 of the Clayton Act by substantially reducing competition for acute inpatient hospital services and ordered Evanston to divest Highland Park. The FTC upheld the ALJ's findings but deemed divestiture too drastic due to costs and disruption to patient services. Instead, the FTC ordered Evanston to institute separate and independent negotiating teams with firewalls for each hospital to compete for selling their health care services to payers. The FTC also required that Evanston submit to additional binding arbitration if the payers and Evanston cannot agree on rates.

- ***Chicago Bridge & Iron*** – Notably, the February 2011 Chicago Bridge & Iron merger was subject to HSR pre-merger notification filing requirements. Despite being notified of the transaction, the Commission, in October 2001, issued an administrative complaint against Chicago Bridge for its acquisition of the Water Division and Engineered Construction Division of Pitt-Des Moines. Four years later, in a decision that was later affirmed by the Fifth Circuit, the Commission found that the transaction violated Section 7 by combining the two dominant domestic suppliers of certain types of industrial and water storage tanks. The Commission required Chicago Bridge to create and then divest a new stand-alone division capable of competing in the relevant markets within six months.

These cases are only a handful of the challenges brought by the FTC and DOJ against consummated mergers. When considering a deal that falls below the HSR filing thresholds but still increases concentration significantly, the merging companies should consider whether the deal is worth the risk of a potential post-consummation challenge. If the deal allows the merged company to eliminate a competitor and increase prices, it raises significant antitrust issues and the companies should consult antitrust counsel before consummating the deal.

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Venable LLP is available to provide further information or assist merging or merged companies. Please contact **Lisa Jose Fales** at 202-344-4349 (**ljfales@Venable.com**) or **Robert P. Davis** at 202-344-4514 (**rpdavis@Venable.com**) for further information and assistance.

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1. *Polypore Int'l, Inc. v. Fed. Trade Comm'n*, No. 11-10375, 2012 U.S. App. LEXIS 14195 (11th Cir. July 11, 2012).

2. J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Consummated Merger Challenges—The Past is Never Dead, Remarks at ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2012), available at **www.ftc.gov/speeches/rosch/120329springmeetingspeech.pdf**.