Takeaways from Government Victories in Recent Antitrust Merger Trials

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Recent government victories in the antitrust challenges to the consummated mergers of Bazaarvoice/PowerReviews and St. Luke's/Saltzer are the latest in a string of trial successes by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), respectively. Below are some practical takeaways from the two decisions.

Takeaways

- Companies Should Consult Antitrust Counsel Even if an HSR Filing is Not Required. Simply because a deal does not require an HSR filing, does not mean it will escape scrutiny. Both *Bazaarvoice* and *St. Luke's* involved situations where no HSR filing was made and the mergers had been consummated. These cases reflect the fact that if the agencies believe there is a problem—even with a smaller consummated deal—they are willing to devote the resources to reverse it and, in the process, to send a message.

- A Dynamic Market is Not a Panacea. The authorities are likely to be suspicious of any deal that results in a firm with high market share and that suspicion is not easily removed. Bazaarvoice's arguments about the dynamic nature of the industry and the likelihood of entry by tech giants did not persuade the court. Likewise, the *St. Luke's* court found that the antitrust laws apply even where the parties claimed they were attempting to enhance coordination to reduce costs, one goal of the Affordable Care Act.

- Take Precautions to Prevent Creating Bad Documents. Companies should know that the agencies are increasingly attempting to litigate cases through executive statements and contemporaneous documents. In both cases, the complaints and court opinions cite many of these statements. The *Bazaarvoice* opinion in particular illustrates that it may be difficult to counteract harmful contemporaneous documents with post-merger evidence. Antitrust training may help to avoid the creation of some bad documents.

- Be Prepared to Litigate. Over the last three years, the government, particularly DOJ, has shown an increasing willingness to go to court, especially where they believe that they can use the parties' documents to tell the story that the parties expected the deal to reduce competition. Moreover, there is some indication that they think they can extract better settlements after filling a complaint. As a result, it is important to understand how far a party is willing to go to "fix" the government's concern and to be prepared to offer up that fix before the government sues. To the extent that the government overreaches, parties need to be prepared to meet—and beat—the government in court. While DOJ and FTC currently are on a "roll," the longer-term track record of the government, particularly DOJ, is not that good.

Background

United States v. Bazaarvoice, Inc. (N.D. Cal.)

On June 12, 2012, Bazaarvoice, the leading provider of Ratings and Reviews ("R&R") platforms to online merchants, purchased its rival, PowerReviews, in a transaction that did not require an HSR filing. DOJ opened an antitrust investigation two days after the deal closed. Six months later, DOJ brought an antitrust suit to unwind the deal, and, after a 17 day trial, the court ruled on January 8, 2014 that the transaction violated the antitrust laws. The court will address remedies after additional briefing from the parties.

The court agreed with DOJ that there was a market for R&R platforms and found that Bazaarvoice's post-merger market share exceeded 50 percent. That, the court concluded, was sufficient for DOJ to establish a prima facie case that the merger was anticompetitive (i.e., violated Section 7 of the Clayton Act). In rejecting Bazaarvoice's arguments that it faced a lot of actual and potential competition post-merger, the court gave particular importance to pre-merger statements by executives from Bazaarvoice and PowerReviews, referencing quotes from executives, e.g., that the acquisition would be "[p]otentially taking out our only competitor" and that benefits of the merger would include "[m]onopoly in the market" and "[b]etter monetization w/o pricing pressure." On the other hand, the court generally dismissed testimony from customers supporting the merger. The court reasoned that customers "do not engage in a specific analysis of the effects of a merger," "were not privy to most of the evidence presented to the Court, including that of the economic experts," and that "pricing proposals in negotiations are opaque to customers . . . [making it] difficult for those customers to discern what is actually happening in the market."

Although the opinion in *Bazaarvoice* acknowledged "the debate over the proper role of antitrust law in rapidly changing high-tech markets," the court found no "evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects." The dynamic nature of the market, however, may prove more important in the forthcoming remedies phase.

<u>*Saint Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd.* (D. Idaho)</u>

On December 31, 2012, St. Luke's, a healthcare system operating in and around Nampa, Idaho, acquired Saltzer Medical Group, Idaho's largest independent, multi-specialty physician practice group in a transaction that did not require an HSR filing. The FTC filed a complaint to unwind the acquisition on March 12, 2013. After a 19-day trial, the court ruled on January 24, 2014 that the transaction violated the antitrust laws and stated it would order divestiture.

Accepting the FTC's proposed market definition, the court found St. Luke's post-merger share was nearly 80 percent, which established on a prima facie basis that the merger was illegal. In evaluating potential anticompetitive effects, the court relied primarily on pre-merger documents and customer testimony. For example, the court cited documents that indicated a plan to fund a pay raise for physicians by obtaining "higher hospital reimbursement" as a result of the transaction. Likewise, the court referenced an email that discussed how St. Luke's could improve Saltzer's negotiating position with insurance plans because "there would be the clout of the entire network." In contrast to the *Bazaarvoice* court, the *St. Luke's* court relied on customer testimony, in particular from Blue Cross of Idaho, the largest insurer in Idaho, expressing concern about the transaction. The court also found the entry of new competitors unlikely.

St. Luke's represents an interesting interplay between the antitrust law and the Affordable Care Act ("ACA"). In its proposed findings of fact, St. Luke's claimed its integration with Saltzer furthered "both state and federal policies, such as those expressed in the Affordable Care Act" and stated the ACA "encouraged the expansion of shared-risk, integrated care." While the ACA may envision benefits to the public from such integration, the court reasoned that private parties cannot seek to bring about such benefits through mergers that violate the antitrust laws.

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