PROSKAUER ROSE LLP®

Client Alert

A report for clients and friends of the Firm

January 2009

Spirited Antitrust Enforcement

A series of cases brought days apart in the final weeks of 2008 signal active antitrust enforcement, even as M&A activity slows. Both the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") are separately seeking to undo completed transactions that were not subject to the HSR notification requirements. In another case, the FTC has secured an $800,000 civil penalty for violation of the HSR Act[1].

Under the HSR Act, parties to transactions that meet statutory dollar thresholds (presently $63.1 million) may be required to file notification with the FTC and the Antitrust Division and to observe a waiting period prior to closing. The HSR Act provides a framework for the agencies to review transactions and to address competitive concerns prior to completion. Transactions that are not subject to the HSR Act are permitted to close without agency review. However, all mergers and acquisitions are subject to Section 7 of the Clayton Act and Section 5 of the FTC Act, which prohibit transactions likely to substantially lessen competition, and the antitrust agencies have demonstrated their willingness to bring suit against consummated acquisitions regardless of the reportability of the transaction under the HSR Act.

The cases brought at year's end are *FTC v. Ovation Pharmaceuticals, Inc.*[2], *United States v. Microsemi Corporation*,[3] *In re Iverness Medical Innovations, Inc.*[4] and *United States v. ESL Partners*, L.P. et al.[5] Each marks now recurring themes in antitrust enforcement. The FTC and the Antirust Division have both served notice that consummated transactions are fair game for antitrust enforcement. The message – there are real risks associated with entering into potentially anticompetitive transactions, regardless of whether the HSR Act applies.

The Ovation and Microsemi matters point to an upswing in cases brought to unwind completed transactions that were not subject to HSR notification. In a case that is still pending, the FTC sought earlier this year to undo a transaction in the battery separator business.[6] In 2006 the FTC challenged the Hologic/Fischer transaction, which resulted in the near complete divestiture of the acquired stereotactic breast biopsy system business.[7]

On December 16, 2008, the FTC filed against Ovation Pharmaceuticals, Inc., a complaint, in the United States District Court for the District of Minnesota, for permanent injunction, divestiture or rescission, and equitable relief including disgorgement of monopoly profits relating to Ovations's 2006 acquisition of a monopoly over the only FDA-approved drugs to treat PDA, a life-threatening heart condition that primarily affects low birth-weight premature infants. According to the FTC's complaint, shortly after acquiring rights to Indocin, in August 2005, Ovation acquired, in January 2006, U.S. rights to NeoProfen, the only alternative PDA drug which was subsequently approved by the FDA in April 2006. The FTC alleges that after Ovation acquired the rights to NeoProfen and eliminated the drug as a competitive threat, the company raised the price of Indocin, by nearly 1,300

---

1 Hart-Scott-Rodino Antitrust Enforcement Act of 1976, as amended.

2 http://www.ftc.gov/os/caselist/0810156/index.shtm

3 http://www.usdoj.gov/atr/cases/f240500/240537.htm

4 http://www.ftc.gov/os/caselist/0610123/index.shtm

5 http://www.ftc.gov/os/caselist/0510091/index.shtm

6 *In re Polypore International, Inc.*, http://www.ftc.gov/os/adjpro/d9327/091008cmp9327.pdf, see Proskauer Rose Client Alert at: http://www.proskaueratwork.com/Public/news_publications/client_alerts/content/2008_10_16/_res/id=sa_PDF/17006-101608-M%20&A%20Unraveling-ca-v2.pdf

7 *In re Hologic, Inc.*, http://www.ftc.gov/os/caselist/0510263/0510263complaint.pdf, see Proskauer Rose Client Alert at: http://www.proskauer.com/news_publications/client_alerts/content/2006_07_19/_res/id=sa_PDF/12773-071906-FTC%20Challenges%20Consummated%20Transaction.pdf

percent from approximately $36 to approximately $500 per vial, then launched NeoProfen, in July 2006, at a price slightly below the elevated price of Indocin.

In announcing the filing of the FTC's complaint, acting FTC Bureau of Competition Director David P. Wales said, "By acquiring its only competitor in the treatment of a serious heart condition affecting premature babies, Ovation has been able to charge dramatically higher prices for its drugs." The complaint further alleges that the two drugs are the only PDA drugs on the market and that developing a new drug and obtaining FDA approval to market it in the U.S. is costly and time consuming. Particularly so because of the small size of the market for PDA drugs, with an estimated patient population of only 30,000, thus limiting sales opportunities for a potential new entrant. The FDA approved a generic version of Indocin in July 2008, but according to the FTC's complaint, the product has not yet entered the market. The FTC is seeking a ruling that Ovation's acquisition of NeoProfen violates Section 7 of the Clayton Act, an injunction and divestiture or rescission to restore competition and bar Ovation from acquiring or maintaining simultaneous legal or beneficial interests in NeoProfen and Indocin, and disgorgement of unlawfully obtained profits.[8]

On December 18, 2008 the Antitrust Division filed a complaint in the United States District Court for the Eastern District of Virginia challenging Microsemi's July 2008 acquisition of substantially all of the assets of Semicoa, Inc. under Section 7 of the Clayton Act and Section 2 of the Sherman Act. The Antitrust Division alleges in its complaint that the acquisition "significantly harmed competition in the development, manufacture and sale of certain specialized high reliability electronic components used in aerospace and military applications." These high reliability components are certified by the Department of Defense as Joint Army-Navy Space ("JANS") or Joint Army-Navy Technical Exchange-Visual Inspection ("JANTXV"). According to the complaint, prices for the components, small signal transistors and 5811 type diodes, increased as a result of the transaction, and likely will continue to increase. The complaint also alleges that delivery times have become less reliable, and that the terms of service likely will become less favorable.

The Antitrust Division alleges that the transaction created a monopoly for high reliability small signal transistors, and that as a result, Microsemi currently faces no competition for the sale of these products. In the complaint, the Antitrust Division alleges that Microsemi has raised prices significantly on the components following the acquisition, and that as a result of less favorable terms of service, the acquisition will result in increased risks and delays on critical military and space-related programs. According to the complaint, entry into the development, manufacture and sale of the components would not be timely, likely, and sufficient because the process required to secure the required certifications and qualifications is time consuming and likely would not occur in less than two years, and because of the significant investment required relative to the size of the potential markets. The Antitrust Division is asking the court to order the divestiture of the acquired assets.

On December 23rd, the FTC announced a proposed complaint and consent order against Inverness Medical Innovations, Inc., for alleged maintenance of monopoly of the market for consumer pregnancy tests, in violation of Section 5 of the Federal Trade Commission Act, through its 2006 acquisition of competing technology from ACON Laboratories, Inc. According to the FTC's complaint, Inverness holds a dominant market share of approximately 70% of the U.S. consumer pregnancy test market and manufactures and sells consumer pregnancy tests in the U.S. under brand names that include Clearblue, Accu-Clear, and FactPlus.

In 2006, Inverness acquired a competing consumer pregnancy test business and other assets from ACON Laboratories, Inc., which, according to the complaint, served to solidify Inverness's dominant market share and jeopardized the development of consumer pregnancy tests that Inverness regarded as potential future competitive threats. According to the FTC's proposed complaint, Inverness engaged in a course of conduct to maintain its monopoly power by threatening to hamper or stifle future competition from emerging consumer pregnancy test technologies, including imposition of a covenant not to compete, which limited the scope and duration of ACON's digital pregnancy test joint venture with Church & Dwight Co., Inc., Inverness's leading competitor, required ACON to surrender to Inverness any profits from the joint venture, and gave Inverness rights to the intellectual property developed by the joint venture. The complaint also alleges that after Inverness acquired the rights to ACON's development stage water-soluble dye consumer pregnancy test product, Inverness ceased development and marketing efforts for the product in a further effort to maintain its unchecked market position.

The FTC's proposed consent order requires Inverness to divest the consumer pregnancy test intellectual property that it acquired from ACON, remove barriers to ACON's supply of consumer pregnancy tests to Chuch & Dwight, and refrain from interfering with the future development and supply of consumer pregnancy tests by the joint venture partners. According to David Wales, "The Commission's action today

[8] Two FTC Commissioners filed concurring statements indicating that they would have gone further and sought the divestiture of both drugs.

clears the way for more vigorous competition in the future that will benefit consumers through lower prices and more innovation."

While both agencies are demonstrating their determination to undo anticompetitive acquisitions, regardless of the HSR Act, they are also demonstrating their commitment to enforce the requirements of the Act regardless of whether the underlying transaction raises antitrust concern. In a case reminiscent of the FTC's *ValueAct* case[9] brought in 2007, investment funds affiliated with ESL Investments Inc. have agreed to pay a combined $800,000 civil penalty for HSR Act violations. As in *ValueAct*, the ESL case stems from HSR Act violations that arose as a result of incremental investments in an existing portfolio company, in this case, AutoZone, Inc. ESL and its affiliated funds invested in AutoZone as early as 1999, and at that time observed the HSR Act waiting period prior to investing. The violations alleged occurred in 2004 when two investment funds affiliated with ESL increased their stake in AutoZone and failed to file HSR Act notifications prior to doing so.

The antitrust agencies have taken an aggressive stance in recent years on HSR Act violations, and the record is replete with example after example of substantial penalties imposed in cases where HSR filings would have been inconsequential and routine. In announcing the filing of the complaint and stipulated proposed judgment, David Wales said, "The Commission takes the premerger notification requirements of the HSR Act very seriously and will not hesitate to take action when companies or individuals shirk their filing responsibilities," and further, that "Thirty years after becoming law, the HSR Act and its filing requirements should be well known to companies and individuals making acquisitions and the significant civil penalties imposed here should reinforce the need to fully comply with the Act."

An uptick in antitrust enforcement expected in the new administration, coupled with the agencies' demonstrated interest in aggressively pursuing HSR violations and enforcement action against transactions that pose competitive harm, including completed transactions that fall below the HSR notification thresholds, call for a renewed emphasis on careful antitrust and HSR analysis of transactions during the next wave of M&A activity.

---

[9] *U.S. v. ValueAct Capital Partners, L.P.*, http://www.ftc.gov/os/caselist/0510204/071219complaint.pdf, see Proskauer Rose Client Alert at: ValueAct http://www.proskaueratwork.com/Public/news_publications/client_alerts/content/2008_01_04/_res/id=sa_PDF/15557-010408-Investment%20Fund%20Will%20Pay%20$1.1%20Million%20Civil%20Penalty-ca-v2.pdf

Alicia J. Batts
202.416.6812 – abatts@proskauer.com

Rhett R. Krulla
202.416.6833 – rkrulla@proskauer.com

John R. Ingrassia
202.416.6869 – jingrassia@proskauer.com