

**MERGERS & ACQUISITIONS AND
ANTITRUST ADVISORY**

August 10, 2006

**FTC Issues Reminder that Even Small,
Consummated Deals Can Be Challenged as Anticompetitive**

Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1975 (HSR Act) to provide the federal antitrust agencies an opportunity to review certain large proposed mergers or acquisitions before they occurred.¹ Mergers or acquisitions that fall below the HSR Act's current \$56.7 million threshold are not required to be reported to the Federal Trade Commission (FTC) and Department of Justice (DOJ) prior to consummation. Merger parties often have taken comfort that if they are below the HSR Act threshold or if they sail through an HSR filing without any governmental challenge, then they have no antitrust concerns. The FTC, in a couple of recent actions, has sent a wake-up call to corporate America that any such comfort may be illusory.

On July 7, 2006, the FTC announced that it had challenged Hologic Inc.'s 2005 purchase of Fischer Imaging Corporation's breast cancer screening and diagnosis business. Hologic had purchased Fischer's mammography and breast biopsy business, including a prone stereotactic breast biopsy system (SBBS), for \$32 million in September 2005. According to the FTC, Fischer was Hologic's only significant competitor in the United States market for the prone SBBS product at the time of the merger, leaving Hologic with a "virtual monopoly in the U.S. prone SBBS market." See July 7, 2006 FTC press release (available at <http://www.ftc.gov/opa/2006/07/hologic.htm>).²

The FTC's complaint alleged that there was little prospect for new entry into the market because of the strength and breadth of Hologic's portfolio, as well as research, development and regulatory hurdles. The FTC also observed that the merger would have deprived American women of the benefits of competition for SBBS. Hologic agreed to divest to Siemens all of its SBBS-related assets while retaining a license to the related patents.

Post-consummation challenge is not limited, however, only to non-reportable transactions. The agencies also have challenged HSR-reportable deals that were initially reviewed by the agencies without any challenge. In *In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, Docket No. 9315

¹ Currently, the HSR Act requires parties to acquisitions of securities, assets, or interests in non-corporate entities valued at more than \$56.7 million in which one party has at least \$113.4 million in sales or assets and the other party has at least \$11.3 million in sales or assets to submit Premerger Notification Forms and observe a specified waiting period prior to closing.

² The FTC defined the relevant market as the production and sale of prone SBBSs in the United States.

(available at <http://www.ftc.gov/os/adjpro/d9315/index.htm>), the FTC filed a complaint challenging the merger of Evanston and Glenbrook Hospitals with Highland Park Hospital four years after it was consummated. The complaint alleged that the merger had substantially lessened competition in the market for general acute-care inpatient services sold to managed care organizations. After an eight-week trial, the administrative law judge found that the new hospital obtained price increases significantly above its premerger prices and significantly larger than those of comparison hospitals, ordering full divestiture. The case is currently on appeal before the full FTC.³

The lesson from these recent post-closing antitrust challenges is that the antitrust agencies have made clear that they are willing to scrutinize transactions after consummation, even if the transactions are not large enough to be reportable under the HSR Act or have been notified to the agencies without a challenge. Counsel and parties considering acquisitions or mergers need to keep in mind that antitrust issues should be addressed at the front end of any legal analysis, particularly in concentrated industries, regardless of the size of the transaction.

³ See also, *In the Matter of Chicago Bridge & Iron Co. N.V., Chicago Bridge & Iron Co., and Pitt-Des Moines, Inc.*, Docket No. 9300 (available at <http://www.ftc.gov/os/adjpro/d9300/050106opinionpublicrecordversion9300.pdf>) (FTC began investigation after HSR reporting and expiration of statutory waiting period, but before parties consummated transaction). Companies may also face similar post-closing concerns in Europe. The European Court of First Instance (Case No. T-464/04, July 13, 2006) recently annulled the European Commission's approval of the 2004 Sony Music/BMG merger (decision no. C(2004) 2815, July 19, 2004).

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