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Daniel E. Hemli & Jacqueline R. Java
Bracewell & Giuliani LLP

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I. INTRODUCTION

While the recovery in mergers and acquisitions activity following the global financial crisis so far has been tepid at best, antitrust merger enforcement has been taking place at an almost frantic pace. This heightened enforcement activity follows on the heels of significant developments in antitrust merger law and policy, including new Horizontal Merger Guidelines ("HMGs") issued by the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ"), as well as changes to the Hart-Scott-Rodino ("HSR") filing requirements and enforcement actions against those who violate the HSR rules. Important legal and practical lessons can be gleaned from these cases.

II. INCREASE IN MERGER LITIGATION

The antitrust agencies recently have brought a string of lawsuits opposing M&A transactions in a variety of industries. Several of these challenges have been resolved, while some are pending.[2] Other transactions have been abandoned because of threatened litigation.

Most recently, in September of this year, 3M's proposed $550 million acquisition of Avery Dennison Corp.'s Office and Consumer Products Group, which had been announced in January, was thrown into disarray when the DOJ threatened to file a civil antitrust lawsuit to block the deal. The agency said the two companies were each other's closest competitors in the markets for labels and sticky notes and that the proposed merger would have given 3M more than an 80 percent share of those markets.[3] It is unclear to what extent the companies anticipated this

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[1] Daniel E. Hemli is a partner and Jacqueline R. Java is a counsel at Bracewell & Giuliani LLP. The views expressed herein are those of the authors and are not to be attributed to the authors' firm or clients. A version of this article appeared in the *New York Law Journal*.

[2] *See*, for example, H&R Block's proposed acquisition of TaxACT, which was blocked by a U.S. District Court (*United States v. H&R Block, Inc.*, 833 F.Supp.2d 36 (D.D.C. Nov. 10, 2011) (*HRB*)); AT&T's abandoned merger with T-Mobile (Press Release, AT&T Inc., AT&T Ends Bid to Add Network Capacity Through T-Mobile USA Purchase (Dec. 19, 2011), *available at* http://www.att.com/gen/press-room?pid=22146&cdvn=news&newsarticleid=33560&mapcode=corporate|wireless-networks-general); the FTC's successful petition for U.S. Supreme Court review of a federal appeals court ruling concerning Phoebe Putney Health System's acquisition of Palmyra Park Hospital in Albany, Georgia (FTC Petition for a Writ of Certiorari, *FTC v. Phoebe Putney Health System, Inc.,* No. 11-1160 (U.S. Mar. 23, 2012), *available at* http://www.ftc.gov/os/caselist/1110067/120323phoebeputneypetition.pdf); and the 11th Circuit Court of Appeals opinion affirming the FTC's decision holding that Polypore International's 2008 acquisition of Microporous Products was anticompetitive and ordering divestiture of all acquired assets (*Polypore International, Inc. v. Federal Trade Commission*, 686 F.3d 1208 (11th Cir. Jul. 11, 2012)). Polypore has filed an appeal with the 11th Circuit in this case. *See* Polypore International, Inc. Petition for Panel Rehearing or Rehearing En Banc, *Polypore Int'l, Inc. v. Federal Trade Commission,* No. 11-10375 (11th Cir. Aug. 27, 2012).

[3] Press Release, DOJ, 3M Company Abandons Its Proposed Acquisition of Avery Dennison's Office and Consumer Products Group After Justice Department Threatens Lawsuit (Sept. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/September/12-at-1076.html.

possible outcome.[4] The DOJ's September 4 press release, which announced that 3M had "abandoned" its acquisition plans, triggered an unusual battle of words, with the companies issuing a joint statement just hours later in which they clarified that they "voluntarily" withdrew their HSR filings and remained committed to exploring options to address the DOJ's concerns and obtain antitrust approval.[5] A month later, however, the companies announced that they had terminated their agreement, officially scrapping the deal.[6]

What do these cases mean for deal makers? These recent challenges lay to rest any lingering doubts regarding the willingness of the antitrust agencies to litigate and their ability to win. This trend highlights the critical importance for potential buyers and sellers of considering carefully and as early as possible the antitrust risk when contemplating a transaction.

These cases also reaffirm that deals of any size and scope, in any industry, are potentially open to intense and costly antitrust scrutiny and challenge in court. While the AT&T/T-Mobile transaction would have been a megamerger of two large telecommunications companies with national presence, H&R Block/TaxACT and Polypore/Microporous were much more modest in size ($287.5 million and $76 million, respectively), and the challenged Phoebe Putney hospital merger was local in scope, covering a single metropolitan area.

There are also several more granular takeaways:

A. Market Definition is Alive and Well

Despite the extensive debate, sparked by language in the 2010 HMGs,[7] regarding a possible de-emphasis on the role of market definition in favor of direct evidence of competitive effects, it is clear that the government will continue to define a relevant market in litigated merger cases and courts will continue to require market definition as an essential element of a transaction's competitive assessment.[8]

The continued vitality of market definition is connected directly to market structure, which looks at the number of participants, their market shares, and market concentration. The

[4] The Purchase Agreement required 3M to license and/or divest limited assets and intellectual property rights of the target business if necessary to obtain antitrust approval, but did not require 3M to pay Avery Dennison a breakup fee if the deal failed to clear the antitrust review process. This may simply reflect the relative negotiating leverage of the companies at the time the agreement was entered into.

[5] Press Release, 3M and Avery Dennison Corp., 3M and Avery Dennison Respond to DOJ Announcement Regarding Proposed Transaction (Sept. 4, 2012), *available at* http://news.3m.com/press-release/company/3m-and-avery-dennison-respond-doj-announcement-regarding-proposed-transaction.

[6] Press Release, 3M and Avery Dennison Corp., 3M and Avery Dennison Terminate Agreement for Purchase of Office and Consumer Products Business (Oct. 3, 2012), *available at* http://news.3m.com/press-release/company/3m-and-avery-dennison-terminate-agreement-purchase-office-and-consumer-product.

[7] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.").

[8] In *HRB*, Judge Beryl Howell acknowledged the argument that market definition may be superfluous if market power can be directly measured or estimated reliably. However, he then pointed out that a market definition may be legally required by Section 7 of the Clayton Act and that no modern Section 7 case has dispensed with the requirement to define a relevant product market. *HRB*, 833 F.Supp.2d at 85 n.35.

recent DOJ and FTC challenges all involved transactions that were characterized by the government as involving four or fewer competitors in markets with high barriers to entry. The court in *HRB* followed prior judicial precedent in rejecting a three-to-two merger, even though the merging parties were the second and third largest players and the combined firm would still have been significantly smaller than the industry's dominant firm.[9]

From a litigation strategy perspective, market structure remains critical, despite the other more sophisticated analytical tools described in the 2010 HMGs. In mergers involving markets with few participants and high concentration, the resulting presumption of anticompetitive effects provides the government with a significant tactical advantage, posing a high hurdle for transaction parties seeking to rebut the presumption. This was recently demonstrated in *Polypore*, where the 11th Circuit applied such a presumption to a situation in which the acquired company was actively preparing to enter the relevant market but had not yet made any sales.

On the other hand, the likelihood of a (successful) merger challenge decreases substantially when there are at least five or six participants in a relatively fragmented market.[10]

B. Don't Forget the Geographic Market

In many merger cases, much time is spent discussing the relevant product market, while the geographic dimension of the market is taken as a given or addressed only in a cursory fashion. Defining geographic markets can be just as important as product market definition in assessing the number of competitors and the level of market concentration. Also, it should not be assumed that a broader geographic market will always be helpful to the merging parties—in some cases a larger geographic market can bring more firms into the picture, thereby making the elimination of a competitor through merger seem less problematic—but in other cases it can be a deal killer.

In AT&T/T-Mobile, for example, the DOJ considered the competitive effects of the transaction not only in local geographic markets (consistent with its analytical approach in prior mergers of mobile wireless providers), but also at a national level. The DOJ argued that, "from a seller's perspective, the Big Four carriers compete against each other on a nationwide basis" and "enterprise and government customers generally require a mobile wireless provider with a nationwide network." By defining a national market, the DOJ in effect removed the many regional and local competitors from the analysis, reducing the number of meaningful players to four, including AT&T and T-Mobile.[11]

C. Documents Will Usually Trump Other Forms of Evidence

The 2010 HMGs introduced a new section titled "Evidence of Adverse Competitive Effects," describing the types and sources of evidence that the agencies find most informative in

[9] *See*, for example, *F.T.C. v. Heinz*, 246 F. 3d 708 (D.D.C. 2001) (FTC won an injunction to block a merger of the second and third largest manufacturers of jarred baby food).

[10] For mergers in a few specific industries, such as oil and gas, the agencies have historically taken enforcement action at lower levels of concentration.

[11] *United States v. AT&T Inc.,* Second Amended Complaint at ¶¶ 14, 19-21, Civil Action No. 11-01560 (D.D.C. September 30, 2011).

predicting whether a merger may substantially lessen competition.[12] The section notes that the agencies typically obtain substantial information from the merging parties and that such information can take the form of documents, testimony, or data.[13] More controversially, the 2010 HMGs place greater emphasis than prior versions on economic theories and tests, some of which, such as the hotly debated upward pricing pressure or "UPP," are not yet widely accepted by antitrust practitioners or economists.

Despite the enhanced role of economic analysis suggested by the 2010 HMGs, the recent agency challenges demonstrate that the merging parties' own business documents, in particular those prepared in the ordinary course, are still the most probative evidence, with fact witness testimony also given substantial weight. The agencies and the courts continue to believe that the best predictor of a merger's likely impact on competition is the views of the merging parties themselves as expressed in the ordinary course of business. Economic tools and expert testimony may be used to support, but are unlikely to supplant, documents and fact testimony.

For example, the DOJ in AT&T/T-Mobile and the FTC in Omnicare/PharMerica cited heavily in their complaints to statements in the merging parties' documents as support for the agencies' proposed market definitions and theories of competitive harm. The court in *HRB* gave significant weight to ordinary course business documents and the testimony of key fact witnesses versus expert economic evidence (although it did also consider the latter).

Companies therefore should be sensitive to the implications that the content and phrasing of business documents, including emails, may have for proposed transactions. They should take basic precautions to avoid creating documents that convey misleading and inaccurate impressions and that would increase the likelihood of an antitrust investigation or challenge. Ensuring business personnel are educated regarding these matters can help avoid potentially significant complications.

D. The Merging Parties' Products Need Not be Closest Substitutes

The *HRB* court's findings on unilateral effects, although not essential to its ultimate conclusion, are notable in two respects. First, Judge Howell rejected the assertion in the 2004 Oracle/PeopleSoft case that for the government to prevail on a unilateral effects claim involving differentiated products, the merging parties must have a monopoly or dominant position in the relevant market, as evidenced by a high combined market share.[14] The court in *HRB* declined to impose a minimum market share threshold for proving a unilateral effects claim.[15] This approach is consistent with the 2010 HMGs, which removed the prior 1992 version's 35 percent combined share threshold for a presumption of anticompetitive effects in differentiated products markets.

[12] 2010 HMGs § 2.
[13] *Id.* at § 2.2.1.
[14] *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1123 (N.D. Cal. 2004).
[15] *HRB*, 833 F.Supp.2d at 85.

Second, the court in *HRB* endorsed the position of the agencies, as expressed in the 2010 HMGs, that unilateral effects can exist even if the merging parties' products are not each other's closest substitutes, so long as they compete head-to-head.[16]

The *HRB* court's position on these issues likely will be relied upon by the government in bringing further unilateral effects cases.

E. Everyone Loves a Maverick

In both AT&T/T-Mobile and *HRB*, the DOJ went to considerable lengths to describe the target companies as "maverick" competitors that played a unique disruptive role in their markets, thereby increasing the likelihood of anticompetitive coordinated effects from those mergers. The concept of a "maverick" firm is specifically discussed in the 2010 HMGs, which state that "[a]n acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects" and provide several examples of firms that may be industry mavericks.[17]

The court in *HRB* was unimpressed by the "maverick" label, finding that the government had failed to "set out a clear standard, based on functional or economic considerations, to distinguish a maverick from any other aggressive competitor."[18] However, after rebuking the government for seeming to suggest that almost any competitive activity by the target company was a "disruptive" indicator of a maverick, the court did attribute weight to the fact that the target had an impressive history of innovation and competition in the market and played a special role that constrained prices. For example, it had introduced a free-for-all offer and was the only remaining large competitor to adopt a low price strategy.[19] The court also found that the merged firm "will have a greater incentive to migrate customers to higher-priced offerings—for example, by limiting the breadth of features available in the free or low-priced offerings or only offering innovative new features in the higher-priced products."[20]

The decision in *HRB* suggests that an acquisition target need not meet some amorphous definition of a "maverick" in order for the government to prove coordinated effects are likely, so long as the target is an aggressive price competitor or innovator.

F. Efficiencies Claims Continue to be a Losing Battle

Despite the addition of a section on efficiencies to the HMGs in 1997 and the retention (with revisions) of that section in the 2010 HMGs, the government has viewed claims of merger efficiencies with significant skepticism, especially in highly concentrated markets. The bar may have been raised even higher following *HRB*. The court dismissed most of the merging parties' claimed efficiencies as not merger-specific and not independently verifiable, holding that cost

[16] *Id.* at 83. The evidence in *HRB* showed that Intuit, the dominant provider of digital do-it-yourself ("DDIY") tax preparation software, was the closest competitor for both H&R Block and TaxACT. The 2010 HMGs state, "[a] merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner." 2010 HMGs § 6.1.

[17] 2010 HMGs §§ 2.1.5, 7.1.

[18] *HRB*, 833 F.Supp.2d at 79.

[19] *Id.* at 80.

[20] *Id.* Analytically speaking, this point seems like a concern about unilateral anticompetitive effects, even though the court raised it in the context of a discussion of coordinated effects.

savings and other efficiencies premised on management's estimation and judgment rather than objective data analysis should not be credited.[21]

As a practical matter, it can be very difficult for an acquirer to develop a detailed efficiencies case for a proposed acquisition of a direct competitor, given the considerable legal and business constraints on pre-merger information sharing and integration planning. Ironically, those strategic combinations of competitors can often generate the greatest efficiencies, which can result in lower prices to consumers if cost savings are passed through.

III. HEIGHTENED ACTIVITY ON THE HSR FRONT

A. New HSR Filing Requirements

On August 18, 2011, significant changes to the HSR mandatory reporting requirements took effect. The intent of the changes was to streamline the HSR Form and capture new information to help the agencies conduct their initial review of a proposed transaction's competitive impact. The FTC has indicated that the changes have assisted the agencies in their analyses of deals and even expedited the review process in some cases. The changes have not altered the substantive standard of antitrust review of transactions that are reportable under the HSR Act; however, the new HSR rules have had real, practical consequences for businesses contemplating transactions.

Some of the amendments have simplified the HSR Form. Others, however, require new, additional information and documents to be submitted with HSR filings. For example, under new Item 4(d) of the HSR Form, parties are required to submit confidential information memoranda and materials prepared by consultants relating to the target business, and documents analyzing synergies or efficiencies associated with the proposed transaction. The new rules also call for more details regarding the HSR filer's corporate structure, including information about "associates"—entities that are commonly managed by or with, but not controlled by, the acquiring party. This change resulted from the antitrust agencies' concern that previously they were not receiving all information necessary for their initial review, particularly in transactions involving private equity funds, hedge funds, or master limited partnerships ("MLPs").

Counsel should ensure that adequate time is permitted for their HSR document collection and review process. In addition, it may be prudent to keep company information up-to-date to decrease the burden for future filings.

B. Recent HSR Enforcement Actions

The agencies have also been actively pursuing violators of the HSR rules in recent months. In December 2011, they assessed the first HSR Act penalty for failing to file where the HSR threshold was triggered by shares received as executive compensation. The DOJ's complaint alleged that Brian L. Roberts, Chairman of the Board and Chief Executive Officer of Comcast Corporation ("Comcast"), violated the HSR Act for receiving Comcast stock as a result of the vesting of restricted stock units ("RSUs") and acquiring additional shares through his 401(k) plan

[21] *Id.* at 90-91.

without first making an HSR notification filing. Mr. Roberts agreed to pay a $500,000 civil penalty to settle the charges against him.[22]

Then, on May 3, 2012, the DOJ announced a plea agreement with Kyoungwon Pyo, a senior executive with Hyosung Corporation, in which Mr. Pyo pleaded guilty to criminal obstruction of justice and agreed to serve five months in U.S. prison for tampering with existing company documents before they were submitted to the antitrust agencies in conjunction with an HSR merger review.[23] The alterations allegedly misrepresented and minimized the competitive impact of the proposed acquisition.[24]

Most recently, in September 2012, Biglari Holdings, Inc. ("Biglari"), a publicly traded holding company, agreed to pay $850,000 to resolve FTC allegations that it violated the HSR Act for failing to report its 2011 acquisition of a stake in the restaurant operator Cracker Barrel Old Country Store, Inc. Biglari relied on the "passive investment" exemption, which allows acquisitions of up to ten percent of a company's voting securities if made solely for the purpose of investment. The FTC claimed that, at the time of its acquisition, Biglari intended to actively participate in the management of Cracker Barrel, including seeking a seat on the company's board of directors. As a result, Biglari was ineligible for the passive investor exemption and was required to submit an HSR notification before acquiring voting shares of Cracker Barrel in excess of the then-$66 million threshold for HSR filings.[25]

These cases make clear that the antitrust agencies take very seriously the HSR filing requirements, even for transactions that do not raise substantive antitrust concerns, as well as their obligation to maintain the integrity of the merger investigation process. Counsel should educate company executives who acquire stock from their employer, whether through the vesting of RSUs or other forms of compensation, that they may need to comply with the requirements of the HSR Act prior to receiving such stock.

Counsel should also note that in egregious situations the consequences for violating the HSR Act may go beyond civil penalties and delay of a transaction. Companies intending to rely on specific HSR exemptions, such as the "passive investment" exemption, should consult experienced antitrust counsel before making acquisitions to ensure they do not run afoul of the HSR Act.

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[22] Press Release, FTC, FTC Obtains $500,000 Penalty for Pre-Merger Reporting Act Violations (Dec. 16, 2011), *available at* http://www.ftc.gov/opa/2011/12/brianroberts.shtm.

[23] Press Release, DOJ, Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction of Justice for Submitting False Documents in an ATM Merger Investigation (May 3, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/282873.htm.

[24] *Id.*

[25] Press Release, FTC, Biglari Holdings, Inc., to Pay $850,000 Penalty to Resolve FTC Allegations That it Violated U.S. Premerger Notification Requirements (Sept. 25, 2012), *available at* http://www.ftc.gov/opa/2012/09/biglari.shtm.