Bank and Corporate Governance Law Reporter
1601 Connecticut Avenue, N.W., Suite 701, Washington, D.C. 20009 • 202-462-5755 • Fax 202-328-2430

FTC Loses Bid For Preliminary Injunction in Merger Case

Michael H. Byowitz & Nathaniel L. Asker
Wachtell, Lipton, Rosen & Katz

A California federal district court has denied an FTC preliminary injunction request in the first merger challenge filed and litigated since issuance of the revised Horizontal Merger Guidelines (see our August 20, 2010 memorandum). *FTC* v. *Laboratory Corp. of America*, No. 10-1873 (C.D. Cal. Feb. 22, 2011). The court found that the FTC had not shown a probability of success on the merits, and in any event, the hardship to defendants from issuing an injunction outweighed any slight showing of probable success. In reaching this conclusion, the court rejected the FTC's proposed product market definition as too narrow.

The challenge was to a consummated transaction whereby LabCorp, the second largest independent clinical laboratory company in the U.S., had acquired Westcliff, the third largest provider of such services in California. The $57.5 million transaction was not reportable under the Hart-Scott-Rodino Act. The FTC learned of the transaction shortly after signing, and LabCorp voluntarily agreed to hold Westcliff separate during the FTC's investigation. Before the hold separate expired, the FTC challenged the transaction in federal district court seeking a preliminary injunction requiring LabCorp to hold Westcliff separate for the duration of an FTC administrative trial.

The FTC sought to limit the relevant product market to services provided under one of two methods of payment for clinical laboratory testing. The proposed market included only services paid for by "capitated" fees (fixed payments per member, per month) and excluded services under a fee-for-service model (based on volume of testing services). The FTC's focus was on physician groups which purchased services on a capitated basis. The court rejected the FTC's view, ruling that different pricing methods for the same services did not support separate product markets, and citing, among other things, an FTC Commissioner's dissent to the decision to challenge the transaction and a prior FTC consent decree defining a broader market.

The district court also found that the equities favored defendants. Westcliff was experiencing substantial monthly losses and continuation of the hold separate would have resulted in further losses, causing irreparable harm to the merging parties who had no ability to recover those losses. Despite recent FTC rules expediting administrative proceedings, the court found that FTC administrative proceedings are long and costly and that the FTC had failed to resolve prior proceedings within previously specified timeframes. This finding—combined with the court's recognition that the FTC Act standard for issuing a preliminary injunction "does not eliminate the FTC's need to demonstrate a likelihood of success on the merits"—could provide support for defendants opposing FTC efforts to short-circuit merits consideration based on the decisions in *FTC* v. *Whole Foods* (see our July 31, 2008 memorandum) and *FTC* v. *Inova Health System* (see our June 16, 2008 memorandum).

The FTC has appealed the LabCorp decision to the Ninth Circuit.

* * *

Volume 46, Number 2, April 2011. Copyright © 2011 Computer Law Reporter, Inc. All Rights Reserved.