September 25, 2015

District Court Denies Preliminary Injunction in FTC's "Potential Competition" Merger Case

In a significant decision, the U.S. District Court for the Northern District of Ohio denied the Federal Trade Commission's request to enjoin the merger of STERIS Corporation and Synergy Health plc pursuant to Section 7 of the Clayton Act. *See FTC* v. *Steris Corp.*, No. 15-cv-1080 (N.D. Ohio Sept. 24, 2015). The decision provides welcome affirmation that the courts will hold the FTC to its burden of proof, and that the parties to a merger can successfully oppose the agency's theories at the preliminary injunction stage.

In contrast to typical merger enforcement actions, in this case the FTC did not allege that the parties are significant present competitors. Instead, the FTC relied on the so-called "actual potential entrant" doctrine, a controversial theory of consumer harm. The Court assumed — without endorsement — that antitrust injury could be predicated on this doctrine, and focused its analysis on whether Synergy "probably would have entered" the U.S. market with X-ray sterilization technology *but for* the merger. Upon a careful review of the documents and trial testimony, the Court concluded the FTC had failed to carry its burden.

The Court found that while Synergy considered the possibility of bringing X-ray sterilization to the U.S. and had continued to do so following the announcement of the proposed merger, Synergy never overcame the significant business and financial hurdles inherent to that strategy. These hurdles included, among other things, securing customer commitments to use X-ray technology, reducing the significant capital costs associated with the project, and developing a robust and reliable business model. As a result, Synergy's business team never sought, and never obtained, corporate board approval to make a "bet the farm" capital investment in a commercially unproven technology.

In its opinion, the Court rejected the FTC's claim that Synergy did not need customer commitments to move forward with X-ray, finding that the FTC's few customer witnesses undercut its case, as their interest in X-ray was "primarily academic." The Court concluded that the evidence showed "unequivocally" that Synergy's failure to obtain customer commitments and to lower capital costs "plagued the development of X-ray sterilization" and justified Synergy's termination of the project.

The STERIS decision demonstrates that an FTC challenge to a merger will not automatically result in an injunction, and that merging parties can successfully test the agency's claims at the preliminary injunction stage. The decision further shows that the courts will delve deeply into the evidence, will look objectively at the business realities of a matter, and will be reluctant to accept speculative theories of competitive injury.

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