FY2016: The Obama Administration Wraps Up Eight Years of Rigorous Enforcement

By Ilene Knable Gotts*

As M&A activity continued to be near record high levels this fiscal year ("FY"),[1] the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have been continuing with their enforcement policies, actively investigating and seeking remedies or challenging transactions, particularly in important sectors of the U.S. economy, including high technology and healthcare. Both agencies also pursued investigations and challenges to consummated mergers, most of which were not reportable under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). The agencies have used consent orders to resolve agency concerns—and even to communicate enforcement policy for the last few decades.[2] In the past few years, however, the agencies (especially the DOJ) also have shown a willingness to commence litigation to challenge a merger, and in some cases subsequently to settle with the parties. Thus, the Obama administration is ending as it began: with a continuous forward path of aggressive enforcement of the antitrust laws, both through consents and litigation, with the clear intent to leave a mark of enhanced enforcement precedent and principles. It will remain to be seen whether the Trump administration chooses to continue the same course—or adopts a different set of priorities in its antitrust enforcement.

1-I. Agency Merger Enforcement Activities

A. FTC

During FY2016, the FTC brought four new litigation challenges in federal district court. In addition, the FTC obtained 15 consent decrees in non-consummated transactions, one consent decree in a consummated transaction, and had at least one transaction abandoned due to antitrust concerns.

1. *FTC Litigation Challenges*

a. *FTC's "Triple Play:" FTC Brings Three New Hospital Merger Challenges*

(1) *Arlington/St. Mary's: FTC Drops Case Due to State Action Doctrine*

On November 6, 2015, the FTC brought an administrative action against Huntington Hospital's proposed acquisition of St. Mary's Medical Center.[3] Both hospitals are located in

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[1] Each fiscal year commences on October 1 and ends on September 30. Mergers and acquisitions activity involving U.S. companies reached $864 billion in FY2016.

[2] *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent, William E. Kovacic: An Antitrust Tribute—Liber Amicorum* (Feb. 28, 2013), *available at* http://www.ftc.gov/speeches/wright/130228antitruststlmt.pdf (raises concerns that the shift toward consents has created the potential for the agency to extract from the parties commitments well beyond what the agency could obtain in litigation, and that such commitments may impair—rather than improve—competition, and thereby harm consumers).

[3] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Two West Virginia Hospitals* (Nov. 6, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-challenges-proposed-

Huntington, West Virginia. According to the FTC, the combination would have had in excess of 75% of the general acute care inpatient hospital services and outpatient surgical services in the four counties surrounding the hospitals.

Unlike in most challenges, in this particular matter, the state attorney general supports the merger on the basis that an "Assurance of Voluntary Compliance" entered into with the hospitals in July 2015 safeguards access to care while controlling costs for patients and saving jobs.[4] The agreement required that, for seven years, the hospitals cannot (1) oppose a competitor's application for a Certificate of Need, so long as the new entrant also accepts patients who are uninsured or receiving Medicaid; and (2) enforce non-competes with former employers or terminate hospital privileges for physicians who begin to offer competing services. The hospitals also agreed that they would not (1) increase their rates beyond the benchmark established by the state healthcare authority; (2) terminate existing contracts with payors that would otherwise renew automatically; (3) seek most favored nations clauses with payors or vendors that affect competitors' pricing or anti-tiering or anti-steering clauses with payors; and (4) restrict vendors from doing business with competitors. Finally, the agreement required the hospitals to take certain steps intended to enhance quality and access to care. The FTC argued that the agreements do not sufficiently protect consumers by replacing the benefits of competition lost through the combination. Moreover, the FTC posited that entry or expansion is unlikely to occur and that, once the agreements lapsed, the hospitals could use their greater leverage to demand higher reimbursements from payors. The complaint also pointed to past "collusive" conduct by the hospitals.

Trial before the administrative law judge was scheduled to begin on April 5, 2016. On March 16, 2016, the FTC staff and the transaction parties filed a joint merger to withdraw the matter from adjudication for 30 days, which the judge granted on March 28, 2016.[5] The purpose of the stay was to permit the FTC to examine a new West Virginia law designed to shield hospital mergers from antitrust review, assuming other state approvals are obtained. On July 6, 2016, the FTC dismissed its complaint, even though it believes that the cooperation agreement between the hospitals, which seeks to replace antitrust enforcement with state regulation and supervision, "are likely to harm communities through higher healthcare prices and lower healthcare quality."[6]

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merger-two-west-virginia-hospitals. The FTC also authorized staff to seek a preliminary injunction in federal court, if needed. The FTC did not immediately pursue the district court injunction because the merging hospitals are awaiting approvals from both the West Virginia healthcare authority and the Catholic Church.

[4] *See* Press Release, Office of WV Attorney General Patrick Morrisey, *AG Patrick Morrisey Announces Antitrust Agreement in Cabell Huntington Hospital, St. Mary's Medical Center Acquisition* (July 31, 2015), *available at* http://members.naag.org/assets/files/Antitrust/files/07-31-2015-AG-Patrick-Morrisey-Announces-Antitrust-Agreement-in-Cabell-Huntington-Hospital%2C-St.pdf.

[5] Order Withdrawing Matter from Adjudication for Thirty Days, *In re Cabell Huntington Hosp., Inc., Pallottine Health Servs., Inc. and St. Mary's Med. Ctr., Inc.*, No. 9366 (FTC Mar. 24, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/032416wdrawadjudorder.pdf.

[6] Press Release, Fed. Trade Comm'n, *FTC Dismisses Complaint Challenging Merger of Cabell Huntington Hospital and St. Mary's Medical Center* (July 6, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/07/ftc-dismisses-complaint-challenging-merger-cabell-huntington.

(2) *Penn State/Pinnacle: Judge Hands FTC a Loss*

On December 10, 2015—18 months after the hospital systems entered into a letter of intent—the FTC, along with the Commonwealth of Pennsylvania, challenged the proposed merger of the Penn State Hershey Medical Center ("Penn State") and PinnacleHealth System ("Pinnacle") in federal district court in Harrisburg.[7] Penn State is a 551-bed hospital in Dauphin County; the Penn State campus includes the Penn State College of Medicine, the Penn State Hershey Cancer Institute, and the Penn State Hershey Children's Hospital. Pinnacle has three hospitals that, combined, have 610 beds. The complaint asserts that the combined hospitals would account for 65% of general acute care inpatient hospital services in Dauphin, Cumberland, Perry, and Lebanon Counties (the greater Harrisburg area). The hospitals defend their combination as being "consistent with the goals of the Affordable Care Act. . . . It creates the depth of services and scale that is required to maintain the health of distinct populations of patients and better positions us to provide the most appropriate setting at the lowest possible cost."[8] The administrative trial was scheduled to begin on May 17, 2016.

On April 11, 2016, District Court Judge John E. Jones III began a five-day hearing on whether to grant the FTC's request for a preliminary injunction ("PI"). On May 9, 2015, Judge Jones denied the PI, indicating that the issue of how to define the relevant geographic market was dispositive to his analysis.[9] He concluded that the FTC's market was too narrow, and that other hospitals within a broader 65-minute drive of Harrisburg were realistic alternatives and would constrain pricing.[10] As a result, Judge Jones concluded that the government was not likely to succeed on the merits. In addition—noting the "evolving landscape of healthcare," including the Affordable Care Act ("ACA") and Medicare/ Medicaid changes—there would be benefits from the combination. Apparently, Penn State had been dealing with hospital overcrowding. The merger would allow it to forego an expensive construction project. Moreover, the court found "compelling" the fact that Penn State had already entered into long-term agreements with insurers Highmark Inc. and Capital BlueCross, which protected against rate increases by preserving the price differential between Pinnacle and Penn State.

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[7] Press Release, Fed. Trade Comm'n, *FTC and Pennsylvania Office of Attorney General Challenge Penn State Hershey Medical Center's Proposed Merger with PinnacleHealth System* (Dec. 8, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-pennsylvania-office-attorney-general-challenge-penn-state.

[8] Press Release, Penn State Hershey, *PinnacleHealth and Penn State Hershey respond to FTC decision* (Dec. 8, 2015), *available at* http://news.psu.edu/story/383975/2015/12/08/pinnaclehealth-and-penn-state-hershey-respond-ftc-decision.

[9] *FTC* v. *Penn State Hershey Med. Ctr.*, 185 F. Supp. 3d 552, 2016 1 Trade Cas., ¶¶ 79, 616 (M.D. Pa. 2016), *available at* http://www.pamd.uscourts.gov/sites/default/files/opinions/15v2362.pdf.

[10] *Id.* at 4.

On May 11, 2016, the Third Circuit granted an expedited appeal of the case.[11] On September 27, 2016, the Third Circuit reversed the district court's decision.[12] The appeal focused on the application of the hypothetical monopolist test, finding three errors in its analysis: (1) the district court should not have relied almost exclusively on the number of patients that enter the proposed market (patient flow data), since such data can be misleading;[13] (2) the district court should not have focused on the likely response of patients to a price increase, but rather should have focused on the likely response of insurers to the same issue;[14] and (3) the district court should not have relied on agreements between the two hospitals and the two insurers when applying the hypothetical monopolist test.[15] The court also rejected the efficiencies defense argument, finding that the $277 million in claimed savings from Penn State being able to avoid construction of a bed tower to relieve its capacity constraints were insufficient to rebut the presumption of anti-competitiveness. First, the evidence was ambiguous at best that Penn State would otherwise need to construct a tower, since it only needed 13 additional beds to operate at 85% capacity (a hospital's optimal occupancy rate). Second, this efficiency would be an output reduction, which should not be recognized because it is anticompetitive. Finally, it was speculative to conclude that such savings would be passed on to consumers, even though there were risk-based contracts in place. The Third Circuit then concluded that the FTC had met its burden of proof and directed that the PI be granted.[16]

(3) *Advocate/NorthShore: FTC Loss on Geographic Market Grounds Reversed on Appeal*

On December 18, 2015, the FTC authorized its staff to challenge the proposed merger of Advocate Health Care Network ("Advocate") and NorthShore University HealthSystem ("NorthShore").[17] The FTC alleged that the merger would create the largest hospital system

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[11] Order Granting Motion for Expedited Review, *FTC* v. *Penn State Hershey Med. Ctr*., No. 16-2365 (3rd Cir. May 24, 2016), *available at* http://www.appliedantitrust.com/14_merger_litigation/cases_ftc/penn_state2015/2_3cir/penn_state_3cir_ipa_order5_24_2016.pdf.

[12] Judgment, *FTC* v. *Penn State Hershey Med. Ctr*., No. 16-2365 (3rd Cir. July 26, 2016), *available at* http://www2.ca3.uscourts.gov/opinarch/162365p.pdf.

[13] Although 43.5% of Penn State's patients traveled to Penn State from outside of the Harrisburg area, the appeals court thought it more pertinent that 91% of patients who live in Harrisburg receive services in the area, thereby supporting the narrower geographic market posited by the FTC.

[14] The appeals court found that the commercial realities are that the patients are largely price insensitive and that it is the insurers that focus on price competition.

[15] The appeals court agreed with the FTC that the existence of long-term contracts did not address the market power presumptions resulting from high market shares.

[16] The grant of the PI meant that the FTC administrative trial on the merits would begin on October 18, 2016. On October 17, 2016, the hospitals abandoned the transaction, citing the likely litigation costs. Joint Motion to Dismiss Complaint, *In re Penn State Hershey Med. Ctr*., No. 9368 (FTC Oct. 19, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/161019jtmtndismiss.pdf.

[17] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Two Chicago-area Hospital Systems* (Dec. 18, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-two-chicago-area-hospital-systems. The FTC also authorized the staff to seek a PI in the U.S. District Court for the Northern District of Illinois. The Illinois Attorney General joined the FTC in opposing the

in the North Shore area of Chicago, accounting for in excess of 50% of general acute care inpatient hospital services. Advocate has 12 hospitals and NorthShore has four. As a result, the FTC contended that the combination is "likely to significantly increase the combined system's bargaining power with health plans."[18] The complaint added that the two hospitals are close competitors with a history of upgrading their facilities, investing in new technologies, and adjusting their managed care contracting approaches in response to each other. As with other hospital merger challenges, the complaint asserted that entry or expansion is unlikely to offset the likely harm to consumers caused by the lost competition. Finally, the complaint posited that the potential cost savings and improvements are neither substantiated nor merger specific and are insufficient to outweigh the likely competitive harm from the merger.

The administrative law judge scheduled the administrative trial to begin on May 24, 2016. Meanwhile, the district court judge considered whether to allow the combination to occur prior to the administrative trial. During discovery in the district court proceedings, the hospitals were successful in convincing the magistrate judge to order the deposition of an FTC attorney to answer questions about the factual basis for the FTC's allegations, but were denied the ability to provide access to the hospitals' in-house counsel to confidential documents.[19] On April 4, 2016, the district judge ruled that the FTC could use statements given during the investigative hearing by executives of the defendant hospitals in a hearing scheduled to commence on April 6, 2016.[20] Also, on April 4, 2016, the defendant hospitals filed a proposed settlement offer with the court under which the hospitals would agree not to raise their prices above a measure of the Consumer Price Index or 1%, whichever is greater, and would be subject to regular audits and inspections by the FTC for seven years.[21] The hospitals also argued that the deal would allow them to offer a new lower-cost insurance product that would be 10% below the lowest-cost Health Maintenance Organization ("HMO") in the Chicago area, thereby expanding the access to and quality of healthcare.

The court held a six-day hearing, during which the hospitals challenged the "false market" delineated by the FTC, since it excluded about 60 general acute care inpatient hospitals along Chicago's Northside. On June 14, 2016, Judge Jorge Alonso denied the FTC's request for a PI.[22]

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merger; both filed the district court case challenge on December 21, 2015. Complaint, *FTC* v. *Advocate Health Care Network, et al.*, No. 15-c-11473 (N.D. Ill. Dec. 17, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/151218ahc-pt3cmpt.pdf.

[18] *Id.*

[19] Jessica Corso, *FTC Atty Can Be Deposed Over Chicago Hospital Merger*, LAW360 (Mar. 1, 2016), *available at* http://www.law360.com/articles/765640/ftc-atty-can-be-deposed-over-chicago-hospital-merger.

[20] Jessica Corso, *FTC Can Present Exec Testimony At Hospital Tie-Up Hearing*, LAW360 (Apr. 4, 2016), *available at* http://www.law360.com/articles/780031/ftc-atty-can-be-deposed-over-chicago-hospital-merger.

[21] Offer of Judgment, *FTC* v. *Advocate Health Care Network, et al.*, No. 1:15-cv-11473 (N.D. Ill. Apr. 4, 2016), *available at* http://www.appliedantitrust.com/14_merger_litigation/cases_ftc/advocate/1_13b/advocate%20ndill_offer_judgment4_4_2016exA.pdf.

[22] Amended Memorandum Opinion and Order, *FTC* v. *Advocate Health Care Network, et al.*, No. 15-c-11473 (N.D. Ill. June 20, 2016), *available at* http://cases.justia.com/federal/district-courts/illinois/ilndce/1:2015cv11473/319662/485/0.pdf?ts=1466512953.

The court found that the FTC had improperly excluded some hospitals from its alleged geographic market. The court found that the FTC's economist had used "flawed criteria" to exclude certain facilities, such as "destination hospitals," that draw patients from throughout the Chicago metropolitan area. The temporary injunction motion filed after the decision by the FTC indicated that the relevant market should not turn on whether some patients went to hospitals outside of the alleged market, but instead on whether commercial payors would rather pay a "small but significant increase in price" than fail to include any NorthShore hospitals in their networks.[23] The court granted the FTC's request for an injunction pending appeal.[24]

The FTC and the State of Illinois appealed the case to the Seventh Circuit.[25] The FTC argued on appeal that the district court erred as a matter of law because it did not properly consider the hypothetical monopolist test, which the FTC states is the standard test routinely used for both geographic and product market definitions. Eleven state attorneys general filed an *amicus* brief supporting the FTC's position.[26] On August 8, 2016, the American Hospital Association ("AHA") filed an *amicus curiae* brief on the defendants' side, which acknowledges that the test provides a "useful framework," but does not require the application of a particular methodology or econometric model.[27] Rather, the AHA states that the district court took the correct approach and evaluated all available evidence.

The Seventh Circuit held oral arguments on August 19, 2016, during which Judge Diane Wood expressed concern that Judge Alonso did not understand the hypothetical monopolist test. Judge David Hamilton also questioned the defendants on the increase in prices following NorthShore's acquiring of Highland Park Hospital in 2000. On October 31, 2016, the Seventh Circuit overturned the district court, finding that the district court's understanding of the market was "clearly erroneous."[28]

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[23] *Id.*

[24] Order Granting Plaintiffs' Motion for Injunction Pending Appeal, *FTC* v. *Advocate Health Care Network, et al.*, No. 15-c-11473 (N.D. Ill. June 17, 2016).

[25] Notice of Appeal, *FTC* v. *Advocate Health Care Network, et al.*, No. 15-cv-11473 (N.D. Ill. June 15, 2016), *available at* http://www.appliedantitrust.com/14_merger_litigation/cases_ftc/advocate/1_13b/advocate%20ndill_noa6_15_2016.pdf.

[26] Brief of the States of Conn., Idaho, Iowa, Me., Mass., Minn., Miss., Mont., Or., Pa., and Wash. as Amicus Curiae In Support of the Appellants, *FTC* v. *Advocate Health Care Network, et al.*, No. 16-2492 (7th Cir. July 22, 2016), *available at* http://members.naag.org/assets/files/Antitrust/files/Advocate-Amicus-FINAL.pdf.

[27] Brief of the American Hosp. Ass'n as *Amicus Curiae* In Support of Appellees and Affirmance, *FTC* v. *Advocate Health Care Network, et al.*, No. 16-2492 (7th Cir. Aug. 8, 2016), *available at* http://www.aha.org/content/16/160808-amici-brief-mergers.pdf.

[28] Opinion, *FTC* v. *Advocate Health Care Network, et al.*, No. 16-2492 (7th Cir. Oct. 31, 2016), *available at* http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D10-31/C:16-2492:J:Hamilton:aut:T:fnOp:N:1854909:S:0. The Seventh Circuit found that the court had incorrectly applied the "hypothetical monopolist" test. The test is an iterative process, first proposing a region and then using available data to test the likely results of a price increase in that region. Also, the opinion indicates that "the evidence was not equivocal on two points central to the commercial reality of hospital competition in this market: most patients prefer to receive hospital care close to home, and insurers cannot market healthcare plans to employers with employees in Chicago's northern suburbs without including at least some of the merging hospitals in their networks." Op. p. 3.

b. *FTC Blocks Staples/Office Depot Combination—Again*

In 1997, the FTC tried—and won—one of the most important merger challenges in history involving the proposed combination of Staples, Inc. ("Staples") and Office Depot, Inc. ("Office Depot").[29] In the 1997 case, the parties claimed that the merger would benefit consumers by allowing them to compete more effectively against large brick-and-mortar competitors, such as Wal-Mart Stores, Inc. The 1997 challenge in many ways marked a watershed for the FTC in its use of econometrics (along with substantiating documents) to define a narrow market—in this case, limited to the sale of consumable office supplies through office supply superstores ("OSS")—and, as a result, a finding that the combination of two of the three OSS chains would be anticompetitive. Specifically, the parties' documents showed (1) intense focus by the parties on their OSS rivals and general lack of concern for other rivals; and (2) use of price zones based on the number of nearby OSS, which resulted in higher prices in localities with fewer OSS, even if there were non-OSS competitors in the area.

Sixteen years later, in 2013, Office Depot proposed acquiring OfficeMax, the third OSS chain. On November 1, 2013, the FTC announced the closing of its seven-month investigation of this transaction, issuing a closing statement that indicated that the "current competitive dynamics are very different" due to two developments: (1) consumers rely more heavily on non-OSS brick-and-mortar retailers, including big-box and club competitors; and (2) the growth of online retailers that stock a vast array of office supply products and can deliver them quickly at nominal cost. OSS had lost substantial sales to these competitors and had responded with new pricing practices and strategies. Most notably, the transaction parties were no longer using price zones and determining retail pricing by the number of local OSS, but instead were selling a majority of their products at nationwide prices. As a result, the econometric analysis reflected the changed competitive dynamics and showed that the proposed merger would not be likely to result in anticompetitive price effects.

Although not discussed in the 1997 *Staples* decision, the FTC indicated in its closing statement that it had also considered the potential impact of the *Office Depot/OfficeMax* combination on sales of consumable office supplies to businesses and other customers on a contract basis. Since there are literally dozens of suppliers that compete effectively to serve small- and medium-sized businesses, the FTC focused on contracts for large multiregional and national customers. The FTC determined that (1) large customers use a variety of tools to obtain competitive pricing; (2) the parties' documents show that they are rarely each other's closest competitors; (3) significant competition exists from non-OSS competitors—such as W.B. Mason—wholesalers, and cooperatives; and (4) potential competitors in adjacent product categories that have existing contractual relationships with the customers can enter to compete. The contract customers reportedly showed little concern about the merger. Accordingly, the FTC concluded that the merger would not harm competition in this channel as well.

The limits of the FTC's 2013 findings were tested when, on February 4, 2015, Staples proposed acquiring Office Depot for $6.3 billion. In 2014, Staples and Office Depot

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[29] *FTC* v. *Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997).

generated about $22.5 billion and $16 billion, respectively, in sales, with about half of their revenues derived from sales of office supplies. Both companies operate in three business segments: North American stores, North American commercial accounts, and international operations.[30] Press reports indicated that: (1) the FTC focused its concerns on the supplies to large "business-to-business" ("B-to-B") customers; and (2) Staples offered to divest $600 million in B-to-B accounts to Essendant, Inc. to mitigate these concerns.[31] The transaction parties were unsuccessful in assuaging these concerns: on December 7, 2015, the FTC challenged the merger on the grounds that the two companies are each other's closest rivals for the sale of office supplies to large customers.[32]

Indeed, the complaint asserted that "Staples' and Office Depot's own documents state that they are the only participants in a 'two-player' national market. . . . As Staples explained at an internal Leadership Summit, 'There are only two real choices for customers, Staples and Office Depot.' Office Depot similarly made clear to a customer that '[o]n a national scale, Office Depot's competition is Staples.'"[33] The complaint further argued that many large B-to-B customers require a vendor offering a broad range of national-brand and private-label products, flexible and reliable delivery, high levels of customer service, customizable product catalogs, detailed utilization reporting, and sophisticated information technology interfaces for procurement and billing, all at competitive prices. The transaction parties purportedly are often the two finalists in bid situations for these customers. Moreover, the complaint asserted that only Office Depot and Staples can serve large national and multiregional B-to-B

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[30] From 2014 through 2016, the FTC also evaluated a few other retail mergers involving grocery stores, dollar stores, and pharmacy chains. These investigations showed the increased use of economic techniques, including the gross upward pricing pressure index, to determine whether the merger creates significant incentives for a post-merger price increase.

[31] Brent Kendall & Liz Hoffman, *Staples, Office Depot in Talks to Transfer Corporate Contracts*, WALL ST. J. (Nov. 13, 2015), *available at* http://www.wsj.com/articles/staples-office-depot-in-talks-to-transfer-corporate-contracts-1447445357.

[32] The FTC filed two suits: (1) in administrative court (*see* Complaint, *In the Matter of Staples, Inc.*, Docket No. 9367 (FTC Dec. 7, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/151207staplesoffdepot_pt3cmpt.pdf); and (2) a PI action in federal district court in the District of Columbia (*see* Complaint, *FTC* v. *Staples, Inc.*, No. 1:15-cv-02115 (D.D.C. Dec. 9, 2015), *available at* http://res.cloudinary.com/gcr-usa/image/upload/v1449787115/FTCvStaplesfedctcomplaint_paudu1.pdf) ("Staples Complaint"). Pennsylvania and D.C. joined the FTC as plaintiffs in the federal challenge. Also, on the same day, the Canadian Competition Bureau filed suit in the Tribunal challenging the transaction. *Comm'r of Competition* v. *Staples, Inc.*, CT-2015-012 (Comp. Trib. Dec. 7, 2015), *available at* http://www.ct-tc.gc.ca/CMFiles/CT-2015-012_Notice%20of%20Application_1_38 _12-7-2015_4759.pdf. In addition, at the time that the FTC and Canadian challenges were filed, the transaction was still being reviewed in the European Union, in a Part II investigation. On February 10, 2016, the European Commission ("EC") cleared the transaction conditioned upon Office Depot's divesting its contract distribution business in Europe and its entire wholesale business operation in Sweden to a buyer that is approved by the EC (*i.e.*, an upfront buyer). The EC found that only Staples, Office Depot, and Lyreco had the capacity to fill international orders and bid for supply contracts for large business customers. The EC expressly rejected the assertion that online commerce companies, such as Amazon, compete in the contract business on the basis that they only sell office products through an online sales channel. *See* Press Release, European Commission, *Mergers: Commission approves Staples' acquisition of Office Depot, subject to conditions* (Feb. 10, 2016), *available at* http://europa.eu/rapid/press-release_IP-16-278_en.htm.

[33] Staples Complaint ¶ 2.

customers that use a single vendor. According to the FTC, local or regional vendors, local or regional consortia, and regional networks of suppliers have significant cost and logistical and coordination challenges. Following the transaction, Staples would have more than 70% of the "relevant" market (defined as the sale and distribution of consumable office supplies to large—*i.e.*, buying at least $1 million annually—B-to-B customers), with the next largest competitor possessing less than 5%.

On December 21, 2015, Staples indicated that the FTC had rejected its latest offer to divest up to $1.25 billion of commercial contracts.[34] On December 22, 2015, Staples filed its Answer.[35] In the Answer, Staples denied that the transaction parties are each other's closest competitors for large B-to-B customers, citing the FTC's 2013 closing statement in which the FTC recognized the existence of strong competition for national and multiregional customers. Staples also denies that many large B-to-B customers single source their office supplies or that competitors are at a cost or other disadvantage. Rather, throughout the Answer, Staples argues that it competes vigorously against numerous competitors, including Amazon and Amazon Business, W.B. Mason, distribution consortia, manufacturers, and vendors of adjacent products.

Prior to the beginning of the hearing, Judge Sullivan threatened to impose monetary sanctions on any corporate witnesses "playing" with confidentiality designations. The judge also refused to let an Amazon.com executive testify remotely from Amazon's Seattle offices.[36] The trial began on March 21, 2016. Over the course of the 10 days in which the FTC presented its case, Judge Sullivan expressed concerns about the FTC's attempt to elicit false information from an Amazon.com executive to support its case, describing the FTC's actions as "very disturbing," and later rejecting certain testimony that the FTC had planned to introduce about Amazon.com's ability to be a competitor in the market. In addition, Judge Sullivan questioned FTC expert economist Carl Shapiro's use of a portion of Fortune 100 companies as a sample of the combined company's market share among companies that spend more than $500,000 on office supplies annually. Furthermore, Judge Sullivan also raised questions regarding the admissibility of Dr. Shapiro's analysis of Amazon Business's capabilities in the years to follow because that analysis was not in his expert reports.

On April 5, 2016, Staples and Office Depot decided not to call any witnesses in defense, stating instead that the FTC had not carried its burden to prove the existence of its proffered market (which excludes printer ink and toner) or of any harm to competition to large businesses purchasing office supplies. Instead, the parties started to present closing arguments that day. On April 6, 2016, Judge Sullivan urged the parties to "sit down and talk" with the FTC about terms for resolving the agency's opposition to their merger.

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[34] Kelly Knaub, *FTC Rejects Staples' Concession In $6.3B Office Depot Deal*, Law360 (Dec. 21, 2015), *available at* http://www.law360.com/articles/740390/ftc-rejects-staples-concession-in-6-3b-office-depot-deal.

[35] Answer, *FTC* v. *Staples, Inc.*, Civ. No. 1:15-cv-02115 (filed Dec. 22, 2015), *available at* http://assets.law360news.com/0741000/741771/staples%20-%20answer.pdf.

[36] Jimmy Hoover, *Judge Threatens Fines For Games In FTC Staples Merger Row*, Law360 (Mar. 16, 2016), *available at* http://www.law360.com/articles/772285/judge-threatens-fines-for-games-in-ftc-staples-merger-row.

On May 7, 2016, Judge Sullivan handed the FTC a clear win.[37] Judge Sullivan found that plaintiffs had established their *prima facie* case by demonstrating that defendants' proposed merger is likely to reduce competition in the "B-to-B" contract space for office supplies:

> Defendants' response relies in large part on the prospect that Amazon Business will replace any competition lost because of the merger. Although Amazon Business may transform how some businesses purchase office supplies, the evidence presented during the hearing fell short of establishing that Amazon Business is likely to restore lost competition in the B-to-B space in a timely and sufficient manner.[38]

In assessing the appropriate product market, the court considered consumable office supplies as a "cluster market."[39] In addition, the court defined the market in terms of "large B to-B customers," based on the concept that there is a "targeted" or "price discrimination" market, meaning that sellers can "profitably target a subset of customers for price increases."[40] Such a market requires differentiated prices and limited arbitrage. Arbitrage is limited here because it is not practical or attractive for a large customer to purchase indirectly from or through smaller customers. The plaintiffs defined the large B-to-B customers as customers who spend $500,000 or more on office supplies annually, which constitutes 90% of all enterprise customers.

The defendants argued that the plaintiffs' market is a "gerrymandered and artificially narrow product market limited to *some*, but not all, consumable office supplies sold to only the most powerful companies in the world."[41] Defendants insisted that ink and toner must be included in a properly delineated market and that there is no evidence supporting sales to large B-to-B customers as a distinct market.

The court cites to the transaction parties' documents and the nature of procurement by enterprise customers to reach the conclusion that large B-to-B customers are distinct. In addition, the court finds that these customers seek vendors with sophisticated IT capabilities, dedicated account managers, and next-day and desktop delivery service. The court also found persuasive the FTC's expert economist's testimony regarding the fierce head-to-head competition between the transaction parties for these customers.

The court rejects including ink and toner in the market, finding they are not subject to the same competitive conditions as general office supplies. Competition for the sale of ink and toner has increased due to managed print service vendors providing a bundle of services along with service and maintenance of printers and copiers. Customers are disaggregating their purchases of these items from other items.

The defendants also argued that the plaintiffs' attempt to protect "mega companies" was "misplaced because the merger indisputably will benefit all retail customers and more than

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37 Memorandum Opinion, *FTC* v. *Staples, Inc*., No. 15-cv-02115 (D.D.C. May 17, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/051016staplesopinion.pdf.

38 *Id.* at 4–5.

39 In a "cluster market," items that are not substitutes for each other are clustered together in the same market for analytical commerce.

40 *Id.* at 21.

41 *Id.* at 23.

99 percent of business customers."[42] The court rejected this argument, stating that the "[a]ntitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market."[43]

Based on the delineated market, the market shares of Staples and Office Depot were 47.3% and 39.6%, respectively, *i.e.*, 86.9% combined. The court refers to the current market as a "duopoly with a competitive fringe," that would post-merger have "one dominant firm with a competitive fringe."[44] The court finds that, in addition to the creation of an "undue concentration" in the relevant market, the merger would eliminate head-to-head competition between close competitors.

Although the court recognizes that "Amazon Business may eventually transform the B-to-B office space,"[45] it did not find that, within the next three years, it would replace the competition lost from Office Depot as a result of the proposed merger.

In addition, the court finds that W.B. Mason, the third largest office supply company, retains less than a 1% share of the relevant market. W.B. Mason and other regional and local supply companies face structural disadvantages when purchasing from wholesalers instead of manufacturers. This results in higher costs and, when coupled with their scale disadvantages, they are unable to offer the deep discounts that the defendants offered.

2. *FTC Consents*

In FY2016, the FTC entered into 15 consents resolving concerns raised by proposed transactions: (1) Mylan N.V./Perrigo Company plc (generic drugs);[46] (2) NXP Semiconductors N.V./Freescale Semiconductor Ltd. (RF power amplifiers);[47] (3) ArcLight Energy

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[42] *Id.* at 44.

[43] *Id.*

[44] *Id.* at 49–50.

[45] *Id.* at 62.

[46] Press Release, Fed. Trade Comm'n, *FTC Requires Mylan to Sell Rights to Seven Generic Pharmaceuticals as a Condition of Acquiring Perrigo Company* (Nov. 3, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-requires-mylan-sell-rights-seven-generic-pharmaceuticals. The FTC conditioned its approval on Mylan selling the rights and assets to seven generic drugs to Alvogen Group Inc. For four of these drugs (bromocriptine mesylate, treats type 2 diabetes and Parkinson's disease; clindamycin phosphate/benzoyl peroxide, treats acne; liothyronine sodium, treats hypothyroidism; and polyethylene glycol 3350, a laxative), both Mylan and Perrigo are either currently selling the drugs or have FDA approval to do so. For the remaining three drugs (acyclovir, treats herpes; hydromorphone hydrochloride, treats pain in narcotic-tolerant patients; and scopolamine, prevents motion sickness), the settlement seeks to preserve future competition from the elimination of one likely future entrant from a limited pool of future entrants.

[47] Press Release, Fed. Trade Comm'n, *FTC Requires NXP Semiconductors N.V. to Divest RF Power Amplifier Assets as a Condition of Acquiring Freescale Semiconductor Ltd.* (Nov. 25, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-requires-nxp-semiconductors-nv-divest-rf-power-amplifier. NXP and Freescale develop and manufacture semiconductor products for a wide range of electronic systems. RF power amplifiers are semiconductors that amplify radio signals used to transmit information between electronic devices such as base stations and cell phones. According to the FTC, the worldwide market for these power amplifiers is extremely concentrated, with Freescale and NXP comprising in excess of 60% and Infineon Technologies being the only other significant competitor.

Partners Fund/Cumberland Farms, Inc. (light petroleum product terminals);[48] (4) Rangers Renal Holdings LP/Dialysis Parent LLC (outpatient dialysis services);[49] (5) Hikma Pharmaceuticals PLC/Ben Venue Laboratories (generic injectable pharmaceutical rights);[50] (6) Lupin Ltd./Gavis Pharmaceuticals, LLC (generic drugs);[51] (7) Hikma Pharmaceuticals

[48] Press Release, Fed. Trade Comm'n, *FTC Requires Energy Investor ArcLight Energy Partners Fund to Divest Assets as a Condition of Acquiring Gulf Oil Limited Partnership from Cumberland Farms, Inc*. (Dec. 28, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-requires-energy-investor-arclight-energy-partners-fund-divest. The FTC required ArcLight to divest to Arc Logistics its ownership interest in four light petroleum product ("LPP") terminals in Pennsylvania (including one in each of the Altoona, Scranton and Mechanicsburg markets and another in the Williamsport/Harrisburg market) before permitting ArcLight to acquire Gulf Oil Limited Partnership ("Gulf") from Cumberland Farms, Inc. The FTC alleges that, absent the divestiture, ArcLight would have owned (1) the only terminal handling gasoline and one of two terminals handling distillates in Altoona; (2) one of two terminals handling gasoline and distillates in Scranton; and (3) one of two terminals handling gasoline and one of three terminals handling distillates in Harrisburg. The FTC also alleges that entry is unlikely, due to the high sunk costs and other barriers to entry associated with building a new terminal, as well as to ArcLight having significant excess capacity in these markets, which would also discourage new competitors. In addition, to ensure that they divested the terminals, the order requires ArcLight to maintain minimum throughput volumes at the terminals for two years; to supply Arc Logistics with renewable fuels, which may be blended with LPPs, for five years; and to allow any ArcLight and Gulf customers in the Altoona, Scranton, and Harrisburg markets to cancel their terminaling service contract without penalty for six months after the divestiture.

[49] Press Release, Fed. Trade Comm'n, *FTC Requires Kidney Dialysis Chain U.S. Renal Care to Divest Assets as a Condition of Acquiring Competitor DSI Renal* (Dec. 30, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-requires-kidney-dialysis-chain-us-renal-care-divest-assets. The FTC required U.S. Renal Care, Inc., which is a subsidiary of Rangers, to divest its ownership interests in three outpatient dialysis clinics in Laredo, Texas to Satellite Healthcare, Inc. ("Satellite"), as a condition of its acquiring DSI Renal, a subsidiary of Dialysis Parent LLC. According to the FTC, absent the divestiture, the acquisition would have reduced the number of providers in Laredo from three to two, which, the complaint alleges, would have reduced incentives to improve service or quality for dialysis patients, and increase the ability for U.S. Renal Care to unilaterally increase prices. In addition, the FTC alleges that the Laredo area does not have sufficient available kidney specialists to support new competition in the delineated relevant market. The consent requires that U.S. Renal Care transfer the clinics, as well as the medical director agreement and leases for the divested clinics, and provide Satellite with transitional financial, information technology, and purchasing services.

[50] Press Release, Fed. Trade Comm'n, *FTC Requires Drug Marketer Hikma Pharmaceuticals PLC to Divest Rights to Five Generic Injectable Drugs as a Condition of Acquiring Certain Drug Products from Ben Venue Laboratories, Inc*. (Feb. 19, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/02/ftc-requires-drug-marketer-hikma-pharmaceuticals-plc-divest. The FTC conditioned Hikma's acquisition of the purchase of rights to drug products and related assets from Ben Venue Laboratories upon the divestiture of the rights to five generic injectable products (acyclovir sodium injection, an antiviral used to treat chicken pox, herpes, and other related infections; diltiazem hydrochloride injection, a calcium channel blocker and antihypertensive; famotidine injection, used for ulcers and gastroesophageal reflux disease; prochloroperazine edisylate injection, an antipsychotic; and valproate sodium injection, a treatment for epilepsy, bipolar disorder, anxiety and migraines) to Amphastar Pharmaceuticals, Inc.

[51] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Generic Drug Marketer Lupin Ltd.'s Proposed Acquisition of Gavis Pharmaceuticals LLC* (Feb. 19, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/02/ftc-puts-conditions-generic-drug-marketer-lupin-ltds-proposed. The FTC alleged that Lupin and Gavis are two of only four companies that currently market generic doxycycline monohydrate capsules, used to treat bacterial infections, in two dosage strengths. Prior to the merger, both Lupin and Gavis were recent entrants into this market. The consent requires that Lupin transfer to G&W Laboratories ("G&W")

PLC/Boehringer Ingelheim Pharmaceuticals Inc. (generic drugs);[52] (8) American Air Liquide Holdings Inc./Airgas, Inc. (industrial gases);[53] (9) Energy Transfer Equity, L.P./The Williams Companies, Inc. (interstate natural gas pipeline);[54] (10) HeidelbergCement AG/Italcementi S.p.A. (cement);[55] (11) Ball Corporation/Rexam PLC (aluminum beverage cans);[56] (12)

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all of Gavis's rights and assets related to this drug, including Gavis's manufacturing technology, within 10 days of closing. Also, at the time of the merger, both Lupin and Gavis were two of only a few companies working to develop a generic version of mesalamine extended-release capsules, used to treat ulcerative colitis. The consent requires that: (1) Gavis divest its rights and assets to this drug as well before the acquisition takes place; and (2) Gavis's CEO provide consulting services to help G&W complete the required regulatory work and begin manufacturing the product.

[52] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Drug Manufacturer Hikma Pharmaceuticals PLC's Proposed Acquisition of Roxane Laboratories Inc. and Boehringer Ingelheim Roxane, Inc. from Boehringer Ingelheim Corporation* (Feb. 26, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/02/ftc-puts-conditions-drug-manufacturer-hikma-pharmaceuticals-plcs. The FTC required that Hikma sell to Renaissance Pharma Inc. all of Hikma's interests in generic anti-inflammatory and immunosuppressant prednisone tablets and lithium carbonate capsules, which are used to treat manic-depressive disorder. Without the divestiture, the merger would have combined two of five firms marketing prednisone tablets and two of four firms marketing lithium carbonate capsules. The FTC also required that Hikma divest its 23% ownership interest in Unimark Remedies Ltd. to Unimark, which, upon FDA approval, will have the marketing rights for flecainide acetate tablets in the United States. Roxane (the company that Hikma is acquiring) is one of two companies that have a significant market share for these tablets.

[53] Press Release, Fed. Trade Comm'n, *FTC Requires Industrial Gas Suppliers to Divest Assets as a Condition of Merger* (May 13, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/05/ftc-requires-industrial-gas-suppliers-divest-assets-condition. The FTC found that the acquisition would eliminate competition between two companies of specific industrial gases in specific regional and local markets that were already concentrated, increasing the likelihood that Air Liquide could unilaterally exercise market power. The proposed acquisition would potentially have adverse coordinated effects in those markets as well. As a result, the FTC required Air Liquide to divest (1) 16 separate assets, which are used to produce bulk oxygen, nitrogen and argon (12 are owned by Air Liquide, four by Airgas); (2) two nitrous oxide plants owned by Air Liquide; (3) four Air Liquide facilities that produce liquid carbon dioxide and dry ice and two Air Liquide facilities that produce only liquid carbon dioxide; and (4) three Airgas retail packaged welding gas stores in Alaska. Air Liquide has four months after closing to sell its assets.

[54] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Merger of Energy Transfer Equity, L.P., and The Williams Companies, Inc*. (June 9, 2016), *available* at https://www.ftc.gov/news-events/press-releases/2016/06/ftc-puts-conditions-merger-energy-transfer-equity-lp-williams. The FTC cleared the transaction conditioned on Energy Transfer Equity, L.P. ("ETE") divesting its 50% interest in Gulfstream Natural Gas L.L.C. ("Gulfstream"), an interstate natural gas pipeline that The Williams Companies, Inc. ("Williams") owns. ETE owns a 50% interest in Florida Gas Transmission LLC ("FGT"), the other interstate natural gas pipeline serving the Florida peninsula. The FTC found that competition between these two pipelines had historically enabled Florida customers, such as the electric power utilities, to obtain lower transportation rates and better terms of service. Thus, absent the divestiture, competition in the market for "firm" (*i.e*., guaranteed) pipeline capacity to deliver natural gas to points in the Florida Peninsula would have been reduced. The FTC granted ETE six months post-acquisition to divest the interest. In addition, the FTC alleged that without the divestiture the merger would have harmed future competition from a new interstate pipeline, Sabal Trail Transmission, LLC ("Sabal"), which is scheduled to start transmitting natural gas to parts of the Florida Peninsula in May 2017. Sabal will rely on leased access to a segment of the Transco Pipeline, a Williams-owned large interstate pipeline. The FTC asserted that the newly merged company will have an incentive to deny Sabal additional capacity expansions because ETE's FGT pipeline is a closer competitor to Sabal than the Gulfstream pipeline. The consent requires ETE to negotiate with Sabal for certain additional expansions of the Transco segment.

[55] Press Release, Fed. Trade Comm'n, *FTC Requires Cement Manufacturers HeidelbergCement AG and*

Koninklijke Ahold/Delhaize Group (supermarkets);[57] (13) Mylan Inc./Meda (generic muscle spasms/stiffness drug, generic epilepsy drugs);[58] (14) Teva Pharmaceutical Industries Ltd./Allergan plc (75 generic drugs treating a wide range of illnesses);[59] and (15) ON Semiconductor Corporation/Fairchild Semiconductor International, Inc. (transistors).[60]

Italcementi S.p.A. to Divest U.S. Assets as a Condition of Merger (June 17, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/06/ftc-requires-cement-manufacturers-heidelbergcement-ag-italcementi. HeidelbergCement AG and Italcementi S.p.A. are the second and fourth largest producers of cement worldwide. They compete in the sale of portland cement, an essential ingredient in making concrete in areas of the United States. The FTC conditioned clearance on the divesture of a cement plant in Martinsburg, West Virginia, and up to 11 cement distribution terminals in five metropolitan statistical areas in which the merger would have reduced the number of competitively significant suppliers from three to two. The FTC alleged both unilateral and coordinated effects. The consent is unusual in that the FTC specifies terminals and names two additional terminals that are to be divested at the divestiture buyer's option. The parties have four months after the merger's consummation to complete the divestiture for all but one terminal, which has an upfront buyer.

[56] Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Preserving Competition for Customers of Aluminum Beverage Cans* (Aug. 16, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/08/ftc-approves-final-order-preserving-competition-customers. The FTC required divestiture of eight aluminum beverage can plants to Ardagh Group SA in connection with Ball Corporation's ("Ball") proposed acquisition of Rexam plc ("Rexam"). Ball and Rexam were the first and second largest manufacturers of aluminum beverage cans in the United States and the world. Without the divestitures, the FTC concluded that the merger would substantially lessen competition for standard 12-ounce aluminum beverage cans in three regional U.S. markets: (1) the South and Southeast; (2) the Midwest; and (3) the West. The FTC also found that the merger would adversely impact competition for specialty aluminum beverage cans nationwide. The acquisition would allegedly increase the likelihood of anticompetitive coordination between the two remaining independent beverage can suppliers in the United States. The divestiture buyer, Ardagh, is one of the world's largest producers of glass bottles for the beverage industry and metal cans for the food industry; it does not, however, currently produce aluminum beverage cans, so its obtainment of these assets did not raise competition issues.

[57] Press Release, Fed. Trade Comm'n, *FTC Requires Ahold and Delhaize Group to Sell 81 Stores as a Condition of Merger* (July 22, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-ahold-delhaize-group-sell-81-stores-condition-merger. The FTC conditioned its approval of the merger on the divestiture of 81 stores located in 46 local markets in Delaware, Maryland, Massachusetts, New York, Pennsylvania, Virginia, and West Virginia, to seven identified divestiture buyers. The transaction parties also entered into settlements with the attorneys general of six states that included the payment of $300,000 to cover costs and attorneys' fees. Combined, the transaction parties operate five well-known supermarket chains: Stop & Shop, Giant, Martin's, Food Lion, and Hannaford.

[58] Press Release, Fed. Trade Comm'n, *As a Condition of Acquiring Meda, FTC Requires Mylan to Divest Rights to Two Generic Drugs, One for Muscle Spasms and Stiffness, the other for Epilepsy* (July 27, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/07/condition-acquiring-meda-ftc-requires-mylan-divest-rights-two. Mylan Inc. agreed to divest the rights and assets to two generic pharmaceutical products as a condition of approval of its acquisition of Meda. The parties were two of three companies currently offering 400 mg and 600 mg generic felbamate tablets (used to treat muscle spasms and stiffness), and the transaction would also eliminate future competition for 250 mg generic carisoprodol tablets (used to treat epilepsy), since Meda and only one other company currently produce this drug and Mylan, which owns the U.S. marketing rights to a recently approved carisoprodol product, is the next likely entrant. The consent requires the divestiture of each of these products to an identified upfront buyer.

[59] Press Release, Fed. Trade Comm'n, *FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business* (July 27, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/07/ftc-requires-teva-divest-over-75-generic-drugs-rival-firms-settle. In what the FTC characterizes as "the largest drug divestiture order in an FTC

3. *Abandoned Transactions*

On June 27, 2016, the FTC announced that it had filed an administrative complaint and had authorized its staff to seek an injunction in federal court to prevent Superior Plus Corp. ("Superior") from acquiring rival Canexus Corp. ("Canexus").[61] Both Superior and Canexus are Canadian companies and, according to the FTC, are two of the three major producers of sodium chlorate in North America. Post-merger, the combined company and Akzo Nobel would control 80% of the total sodium chlorate production capacity in North America. The FTC alleged that post-merger Superior would have incentives to curtail output and coordinate prices with the few remaining alternative suppliers of sodium chlorate, which is used to bleach wood pulp for paper, tissue, and other products. Although Superior had offered to divest significant sodium chlorate production capacity, the FTC concluded that the package would not fully eliminate both output suppression and coordination concerns.[62] On June 30, 2016, the transaction parties abandoned the transaction.[63]

4. *Consummated Merger Challenges*

On October 15, 2015, the FTC announced a settlement that would resolve concerns that the combination of six independent orthopedic practices in 2011 in Berks County,

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pharmaceutical merger case," the FTC required Teva to divest the drug portfolios for 79 generic pharmaceutical products to 11 identified upfront buyers.

[60] Press Release, Fed. Trade Comm'n, *FTC Requires ON Semiconductor Corporation to Divest Its Ignition IGBT Semiconductor Business as a Condition of Acquiring Fairchild Semiconductor International, Inc*. (Aug. 25, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/08/ftc-requires-semiconductor-corporation-divest-its-ignition-igbt. The FTC conditioned its approval on ON Semiconductor Corporation's divestiture of its Ignition IGBT business, which produces Insulated-Gate Bipolar Transistors ("IGBT") specifically designed and calibrated for automotive ignition systems. According to the FTC, ON and Fairchild combined account for over 60% of the worldwide market and are each other's closest competitors for Ignition IGBTs sold to automotive suppliers, which then incorporate the devices into the ignition systems they sell to automakers. Under the terms of the proposed consent, ON will divest the business to Littelfuse, Inc. The divestiture includes design files and intellectual property that Littelfuse needs to manufacture the device. ON must also facilitate the transfer of its customer relationships and supply Ignition IGBTs for Littelfuse to sell to customers for up to three years with an option to extend the period for up to two years, while Littelfuse sets up its manufacturing operations.

[61] Press Release, Fed. Trade Comm'n, *FTC Challenges Proposed Merger of Canadian Chemical Companies Superior Plus Corp. and Canexus Corp* (June 27, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/06/ftc-challenges-proposed-merger-canadian-chemical-companies.

[62] Sean Sullivan & Ben Gris, *What does it take to settle a merger case?*, Fed. Trade Comm'n. (July 22, 2016), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2016/07/what-does-it-take-settle-merger-case.

[63] Press Release, Fed. Trade Comm'n, *Statement of Federal Trade Commission Bureau of Competition Director Debbie Feinstein On Superior Plus Corp.'s Decision to Drop its Proposed Acquisition of Canexus Corp*. (June 30, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/06/statement-federal-trade-commission-bureau-competition-director. In contrast, on June 28, 2016, the Canadian Competition Bureau announced that it had cleared the transaction, despite finding that the transaction would likely result in a substantial lessening of competition for the supply of various industrial chemical products in Canada because the expected efficiencies gains outweigh the likely anticompetitive effects of the transaction. Press Release, Canadian Competition Bureau, *Commissioner will not challenge chemical manufacturing acquisition* (June 28, 2016), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04110.html.

Pennsylvania into one entity, Keystone Orthopaedic Specialists, LLC ("Keystone"), was anticompetitive.[64] The complaint alleges that the merger combined 19 of the 25 orthopedists in the county, giving Keystone 76% of the market for orthopedic physician services. The FTC alleged that, prior to the combination, health plans could choose among the individual practices and form networks with some, but not all of them, and, therefore, the merger eliminated this combination and enabled Keystone to use its newly acquired market power to raise prices with most health plans operating in the county. The FTC rejected the notion of merger-specific efficiencies from the merger or that entry or expansion is likely to counter the anticompetitive effects of the merger, indicating that recruiting new orthopedists to enter the market is difficult, expensive, and time intensive. Interestingly, one of the six practices (with eight orthopedists), Orthopaedic Associates, left Keystone in 2014. The FTC included this practice as a defendant in its complaint, indicating that a recombination of this group with Keystone would raise "serious antitrust concerns." Under the settlement, both defendants: (1) must obtain prior approval before acquiring another practice in the county or hiring or offering membership to an orthopedist who has provided services in the county in the past year; (2) are prohibited from coordinating prices with other orthopedists in the market, joint negotiations, or refusals to deal with payors; and (3) must terminate without penalty any existing contracts with payors for the provision of services at the payors' request.

B. U.S. Department of Justice

The DOJ began FY2016 with one merger challenge pending in federal district court. During the course of the trial, the transaction parties abandoned that one pending lawsuit. During the fiscal year, the DOJ brought six additional district court challenges to mergers, with the DOJ obtaining on an expedited basis a PI that caused the seller to choose another buyer for the bankruptcy court's approval, the transaction parties abandoning two of the transactions before trial in these two cases, and the remaining three cases pending trial at the end of the fiscal year. The DOJ entered into 11 consents to resolve concerns in proposed mergers; in addition, reportedly four additional transactions were abandoned due to the agency raising antitrust concerns.

1. *Court Cases*

a. *Electrolux/GE Transaction Terminated During Trial*

On July 1, 2015, the DOJ filed a PI action in D.C. federal district court seeking to block the acquisition of General Electric Company's ("GE") appliance business by AB Electrolux ("Electrolux").[65] The DOJ asserted that the acquisition would combine two of the leading manufacturers of ranges, cooktops, and wall ovens sold in the United States, and, according to the DOJ, would create a duopoly in the sale of these major cooking appliances to builders

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[64] Press Release, Fed. Trade Comm'n, *Two Pennsylvania Orthopedic Practices Settle FTC Charges That Merger Harmed Competition and Inflated Prices* (Oct. 15, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/10/two-pennsylvania-orthopedic-practices-settle-ftc-charges-merger.

[65] Complaint, *United States* v. *AB Electrolux, et al.*, No. 1:15-cv-01039 (D.D.C. July 1, 2015), *available at* https://www.justice.gov/atr/case-document/file/624751/download.

and other commercial purchasers. GE makes and sells appliances under the brand names GE Monogram, GE Café, GE Profile, GE, GE Artistry, and Hotpoint. Electrolux uses the brand names Frigidaire, Tappan, and Electrolux.

The complaint asserted that few appliance suppliers can meet the demands of the contract-channel, which include having a full line of kitchen appliances, a variety of choices and models for each appliance, and a large and sophisticated distribution network that can meet the specific delivery, scheduling, and service needs of contract-channel purchasers. The "Big Three"—GE, Electrolux, and Whirlpool—combined have a share of more than 90% of the sales of each major cooking appliance sold in the contract channel. The proposed acquisition would have left Electrolux and Whirlpool as the only meaningful competitors. Moreover, the complaint asserted that the current competition between Electrolux and GE is important. Electrolux has intensified its efforts in the contract channel and has made significant investments.

There are three types of major cooking appliances: cooktops, wall ovens, and ranges. According to the complaint, for both the retail-channel and the contract-channel, purchasers make their buying decisions based on brand, features, and the ability to meet the purchaser's needs, including service and delivery capabilities. Some contract-channel purchasers prefer to contract with a single supplier for their major cooking appliance needs in order to simplify the process. In addition, the DOJ asserted that "to effectively serve contract-channel purchasers, suppliers need to offer major cooking, refrigeration, and dishwashing appliances, with multiple models across various price points. Weaknesses of other suppliers in major cooking appliances or in the lower pricing tiers make it difficult for them to break into sales in the contract channel, even if they have some success selling refrigerators, dishwashers, or premium appliances outside of the contract channel, because contract-channel purchasers often will not mix and match kitchen appliances by purchasing them from different suppliers."[66]

The complaint asserted that the "more concentrated a market, and the more an acquisition would increase concentration in that market, the more likely the acquisition would result in market power that harms consumers."[67] The complaint then indicated that, for ranges, cooktops, and wall ovens, the pre-acquisition Herfindahl-Hirschman Index ("HHI") is well above 2,500, and the increases are 500 and above in the contract channel, as measured by revenues. Moreover, the DOJ alleges that Electrolux and GE are close competitors and that, in recent years, Electrolux has competed aggressively with GE, winning business with some of the largest home builders nationwide, "with most of those wins coming at the expense of" GE. In addition, since Electrolux manufactures the major cooking appliances that Sears sells under the "Kenmore" brand name, Electrolux would profit post-acquisition not only from a price increase on Electrolux and GE, but also from an increase in the price of Kenmore products. The DOJ found the barrier to economically meaningful entry or expansion to be high, and indicated that purchasers of low- and mid-priced major cooking appliances likely would be particularly harmed by the proposed acquisition. The DOJ cited as among the

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[66] *Id.* at ¶ 18.

[67] *Id.* at ¶ 11.

factors that make timely and sufficient entry into the markets difficult are: (1) developing a brand, "particularly for the 'value' and 'mass market' pricing segments; (2) building effective manufacturing capabilities; (3) solving the 'chicken and egg problem' of needing large volume to drive costs down but needing lower costs to generate large volume; and (4) for the markets of major cooking appliances sold to contract-channel purchasers, developing full lines of kitchen appliances . . . providing services those purchasers demand, and developing distribution networks to meet the exacting needs of those purchasers."[68]

Finally, the DOJ complaint recognized that Electrolux asserted that the proposed acquisition might produce efficiencies, but stated that Electrolux "cannot demonstrate acquisition-specific and cognizable efficiencies that would offset the proposed acquisition's anticompetitive effects. . . ."[69] The defendants and the DOJ requested that the court schedule a November 2, 2015 start date for the trial. A July 2015 joint court filing indicated that the parties remain "amenable" to settling the case, but have been unable to resolve their differences about the likely competitive effects of the merger.[70] On October 30, 2015, the DOJ rejected the latest settlement from the transaction parties. Trial began on November 9, 2015.

During the course of the trial, the defendants, among other things, introduced evidence that showed that the 2006 combination of home appliance companies Whirlpool and Maytag had not harmed competition, even though that deal had led to a higher increase in market concentration than the proposed transaction. The DOJ attempted to rebut this evidence by suggesting that the reason prices declined after the merger is due to the recession having stunted growth in the housing market and resulted in less demand for appliances. In addition, the DOJ used a 2006 report that Whirlpool submitted in defense of its Maytag deal that characterized Electrolux as a price maverick.

On December 7, 2015 (four weeks into the trial), GE exercised its termination rights under the contract as of that date, which triggered its receipt of a $175 million break-up fee.[71]

b. *Parties Drop Transaction Five Months After DOJ Files Challenge to United's Proposed Acquisition of Newark Landing Slots*

On November 10, 2015, the DOJ filed suit in the federal district court in Newark, New Jersey to block United Continental Holdings Inc.'s ("United") proposed acquisition of 24 takeoff and landing slots of Delta Air Lines Inc. ("Delta") at Newark Liberty International Airport ("Newark").[72] According to the DOJ, the acquisition "would increase United's

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[68] *Id.* at ¶ 36.

[69] *Id.* at ¶ 37.

[70] Joint Stipulation Regarding Scheduling and Case Management, *United States* v. *AB Electrolux, et al.*, No. 1:15-cv-01039 (D.D.C. July 16, 2015), *available at* http://www.justice.gov/atr/case-document/file/780511/download.

[71] Press Release, U.S. Dep't of Justice, *Electrolux and General Electric Abandon Anticompetitive Appliance Transaction After Four-Week Trial* (Dec. 7, 2015), *available at* http://www.justice.gov/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-appliance-transaction-after-four-week.

[72] Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit to Block United's Monopolization of Takeoff and Landing Slots at Newark Airport* (Nov. 10, 2015), *available at* http://www.justice.

already dominant position at the airport and would strengthen a barrier that diminishes the ability of other airlines to challenge United at the airport. As a result, the 35 million air passengers who fly into and out of Newark every year likely would face higher fares and fewer choices."[73] The DOJ further asserted that "airfares at Newark are among the highest in the country, while United's service at Newark ranks among the worst." The complaint indicates that United controls 900 Newark slots, which is 73% of the slots allocated to domestic airlines, and over 10 times more slots than its closest domestic competitor, American Airlines. The complaint further indicates that during its 2010 review of the United/Continental combination, the DOJ required United to divest 36 slots at Newark to Southwest Airlines. The complaint asserts that the acquisition of Newark slots by some of the low-cost carriers has forced United to compete, and, with this proposed acquisition of slots from Delta, that United is seeking to reverse the benefits of the 2010 divestiture.

In January 2016, United indicated to the court that it planned to use the new slots to offer new routes and to increase the frequency of its existing ones. Trial was set to commence in June 2016. On April 1, 2016, however, the Federal Aviation Administration ("FAA") issued a notice that it would be opening up capacity at Newark as of October 30, 2016, which means that the airport is no longer slot-controlled or limited to 81 flights per hour. The defendant airlines responded by abandoning their transaction on the grounds that the FAA announcement rendered the planned acquisition of more slots moot and contending that the changes may worsen conditions at Newark, undoing what United indicates are its "significant efforts to minimize congestion-related passenger delays." In contrast, according to Assistant Attorney General Bill Baer: "The FAA's action opens up Newark to more robust competition and achieves the very outcome we sought in litigation: protecting consumers from United's plan to enlarge its monopoly at Newark."[74] Without the FAA's latest action, they were forced to deny requests from United's competitors to add service, even though United was not fully utilizing its takeoff and landing slots.

c. *DOJ Successfully Stops Proposed Acquisition of Bankrupt Newspapers by Tribune Publishing Company*

On March 17, 2016, the DOJ filed a lawsuit in the Central District of California seeking to block the acquisition of Freedom Communications, Inc. ("Freedom"), publisher of the *Register* in Orange County, California and the *Press-Enterprise* in Riverside County, California by Tribune Publishing Company ("Tribune"), publisher of the *Los Angeles Times*.[75] Tribune had been selected as the purchaser of Freedom's newspapers in a bankruptcy auction and intended to seek bankruptcy court approval of its acquisition on March 21, 2016.[76] The DOJ found that the *Los Angeles Times* and the *Register*, combined,

gov/opa/pr/justice-department-files-antitrust-lawsuit-block-uniteds-monopolization-takeoff-and-landing.

[73] *Id.*

[74] Press Release, U.S. Dep't of Justice, *United Airlines Abandons Attempt to Enhance its Monopoly at Newark Liberty International Airport* (Apr. 6, 2016), *available at* https://www.justice.gov/opa/pr/united-airlines-abandons-attempt-enhance-its-monopoly-newark-liberty-international-airport.

[75] Complaint, *United States* v. *Tribune Publishing Co.*, No. 2:16-cv-01822 (C.D. Cal. Mar. 17, 2016), *available at* http://assets.law360news.com/0773000/773149/tribune%20complaint.pdf.

[76] Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit to Stop L.A. Times*

account for 98% of newspaper sales in Orange County and that the *Los Angeles Times* and Freedom's newspapers together account for 81% of English-language newspaper sales in Riverside County. Accordingly, the DOJ asserted that Tribune's acquisition of its most significant competitor would give it a monopoly among newspaper sales in each county and allow it to increase subscription prices, raise advertising rates, and invest less to maintain the quality of its newspapers.[77]

On March 18, 2016, Judge André Birotte, Jr. granted a temporary restraining order to prevent the acquisition pending further proceedings. Judge Birotte found that "local newspapers continue to serve a unique function in the marketplace: they are the creators of local content. It further stands to reason that local advertisers in search of print advertising would choose to advertise with local news providers."[78] As a result, Freedom, supported by the major stakeholders in the bankruptcy estate, on March 19, 2016, recommended an alternative buyer, Digital First Media. On March 21, 2016, the bankruptcy court approved the alternative buyer as the purchaser of these two newspapers.[79]

d. *Parties Abandon Halliburton's Proposed Merger with Baker Hughes After DOJ Brings Court Challenge*

Over 16 months after the deal's announcement, on April 6, 2016, the DOJ filed suit in the federal district court in Delaware to block Halliburton Co.'s ("Halliburton") acquisition of Baker Hughes Inc. ("Baker Hughes").[80] Halliburton, Baker Hughes, and Schlumberger are the "Big Three" oil services companies in the United States.[81] According to the DOJ, the deal would combine the second and third largest firms in the industry, thereby eliminating head-to-head competition in 23 products and services used in oil exploration. The DOJ further argued that over 90% of revenues for each of the transacting parties are derived from business operations competing with the other party. Moreover, the DOJ illustrated in a market share chart that the "merger would leave the industry with just two dominant suppliers—a virtual duopoly."[82] In eight of the 23 product areas, Halliburton and Schlumberger would purportedly have in excess of 90% of U.S. sales; in nine additional product

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Publisher from Acquiring Competing Newspapers (Mar. 17, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-la-times-publisher-acquiring-competing.

[77] *Id.* Interestingly, in the DOJ's update released on April 8, 2016, the DOJ indicated that it had had little opportunity (*i.e.*, two weeks) to investigate fully the antitrust risks posed by the transaction. *See* Division Update Spring 2016, U.S. Dep't of Justice, *Division Obtains TRO to Block Anticompetitive Newspaper Acquisition* (Apr. 11, 2016), *available at* https://www.justice.gov/atr/division-operations/division-update-2016/division-obtains-tro-block-newspaper-acquisition.

[78] Order at 7, *United States* v. *Tribune Publishing Company*, No. 16-cv-01822 (C.D. Cal. Mar. 18, 2016), ECF No. 18, *available at* https://www.justice.gov/atr/file/833786/download.

[79] The sale closed on March 31, 2016.

[80] Complaint, *United States* v. *Halliburton Co. and Baker Hughes Inc.*, No. 1:16-cv-00233 (D. Del. Apr. 6, 2016), *available at* https://www.justice.gov/opa/file/838651/download.

[81] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Halliburton's Acquisition of Baker Hughes* (Apr. 6, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-sues-block-halliburton-s-acquisition-baker-hughes.

[82] *Id.*

areas, the two firms would have in excess of 70% of sales, and in two of the product areas, Halliburton alone would have in excess of 80% of the sales. The "Big Three" are allegedly unique in 10 innovation activities and three projects they are qualified to bid on that are particularly challenging due to the need for products that function in hotter temperatures and are under high pressure.[83]

The transaction parties offered extensive divestitures. The DOJ found the divestiture package inadequate, stating:

> Now, Halliburton has been claiming publicly from day one that it can fix any and all competition concerns, here in the United States, in Europe and around the world. At their request, and to be fair to them, we held off on this lawsuit and looked long and hard at what they put on the table. And, the more we looked, the more we became convinced that this deal is unfixable. Halliburton wants the United States to agree to the most complicated array of piecemeal divestitures and entanglements that [AAG Baer] has ever seen. Halliburton's various proposals—and those have been a moving target—involve selling a grab bag of assets in certain product lines.[84]

The complaint asserts that the proposed divestiture would not replicate the substantial competition between the two rivals that existed pre-merger.[85]

On April 8, 2016, the defendants filed a motion to transfer venue to Houston, Texas, where both companies are based and, according to the defendants, a location that would be more convenient for any potential customer witnesses.[86] On May 1, 2016, the parties announced termination of the merger agreement, stating that "challenges in obtaining remaining regulatory approvals and general industry conditions that severely damaged deal economics led to the conclusion that termination is the best course of action."[87] As provided in the merger agreement, Halliburton paid Baker Hughes a termination fee of $3.5 billion.

In addition to the DOJ, full investigations of the merger were conducted in other jurisdictions, including the European Union (which had "stopped the clock" on March 7, 2016 until it obtained additional information from the parties), Australia (which had issued a statement indicating that the agency had concerns in many markets), Mexico, and Brazil.

e. *DOJ Simultaneously Sues to Block Two Health Insurance Industry Mergers*

On July 21, 2016, the DOJ (and attorneys general from multiple states and the District of Columbia) brought suits in the federal district court for the District of Columbia, challenging

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[83] *Id.*

[84] Press Release, U.S. Dep't of Justice, *Assistant Attorney General Bill Baer Delivers Remarks at Press Call Announcing that the Justice Department Seeks to Block Halliburton's Acquisition of Baker Hughes* (Apr. 6, 2016), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-press-call-announcing-justice.

[85] Complaint at ¶ 10, *United States* v. *Halliburton Co. and Baker Hughes Inc.*, No. 16-CV-00233 (D. Del. Apr. 6, 2016), *available at* https://www.justice.gov/opa/file/838651/download.

[86] Motion to Transfer Venue, *United States* v. *Halliburton Co.*, C.A. No. 16-233-UNA (D. Del. Apr. 8, 2016).

[87] Press Release, Halliburton, *Halliburton and Baker Hughes Announce Termination of Merger Agreement* (May 1, 2016), *available at* http://www.halliburton.com/public/news/pubsdata/press_release/2016/halliburton-baker-hughes-terminate-merger.html.

both of Anthem, Inc.'s ("Anthem") proposed acquisition of Cigna Corp. ("Cigna") and Aetna Inc.'s ("Aetna") proposed acquisition of Humana Inc. ("Humana").[88] The press release stated:

> The complaints allege that the two mergers—valued at $54 billion and $37 billion—would harm seniors, working families and individuals, employers and doctors and other healthcare providers by limiting price competition, reducing benefits, decreasing incentives to provide innovative wellness programs and lowering the quality of care.[89]

The filing of these challenges marks the culmination of almost a full-year investigation by the DOJ. The Aetna/Humana transaction was announced on July 3, 2015, while rumors were already circulating of a potential Anthem/Cigna deal. Aetna hoped that, by being "first," its review would not be tied to the Anthem transaction. However, when Anthem and Cigna announced their deal only three weeks later, the DOJ decided to consider both transactions in tandem.

The appeal of combining the two cases was apparent from the plaintiffs' standpoint: if the two deals are consummated, the "Big Five" health insurance companies will become the "Big Three." All four companies are successful providers that compete to provide Medicare Advantage[90] services. They also compete to sell health insurance on the public exchanges established by the ACA. In addition, all four companies, according to the complaint, compete to develop new models of care. On August 5, 2016, Judge John Bates decided to keep only the Aetna/Humana case. The Anthem/Cigna case was reassigned to Judge Amy Berman Jackson.

(1) *Aetna/Humana*

In the Aetna/Humana complaint, the DOJ alleges that the parties are two of the largest and fastest-growing Medicare Advantage competitors in the country. Before agreeing to merge, Humana was projecting continued enrollment growth and Aetna had aggressive expansion plans. The two companies already competed in more than 600 counties—almost 90% of the counties in which Aetna offers Medicare Advantage. The impact of competition would be particularly acute in 364 counties.

Although both companies participate in the individual and family exchanges across a broad geographic footprint, the complaint focuses on the overlaps in three states: Florida, Georgia, and Missouri. In these states, the two companies compete in more than 100 counties combined. Aetna had recently announced plans to exit from most of the public exchanges next year. After announcement of the acquisition at issue, Humana decided to reduce its public exchange offerings. The complaint alleges that 17 relevant markets would be harmed.

Prior to the commencement of the lawsuit, Aetna had proposed remedies, including divestitures of parts of Aetna's, or Humana's, Medicare Advantage business and had had

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[88] Press Release, U.S. Dep't of Justice, *Justice Department and State Attorneys General Sue to Block Anthem's Acquisition of Cigna, Aetna's Acquisition of Humana* (July 21, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s.

[89] *Id.*

[90] Medicare Advantage is a market-based alternative to traditional Medicare.

initial discussions with potential buyers. The complaint indicates that these remedies were inadequate. According to the complaint, proposed remedies must give the buyer both the means and incentives to effectively compete. The divestitures proposed by Aetna were transfers of contracts to cover individual employees in numerous counties. Nothing would prevent the enrollees from switching back the next enrollment period. The remedy package does not provide the buyer with an intact business unit. The buyer will not be able to replicate the infrastructure, *i.e.*, the physicians, hospitals, technology platforms, claims processing systems, or employees with the requisite knowledge to administer these services. In addition, the divestitures would not include enrollees in related insurance lines, *e.g.*, special needs plans, group Medicare Advantage plans, employer groups, or Medicare Advantage plan enrollees in counties adjacent to the proposed divestitures. Nor does the remedy package attempt to address the concerns raised regarding public exchange competition. In sum, the DOJ argues that the remedy would leave the buyer dependent on Aetna—potentially for years.[91]

Judge Bates scheduled the trial to begin on December 5, 2016. On August 15, 2016, Aetna announced that it will reduce its participation in the public healthcare exchanges from 778 counties to 242 counties, and decrease the number of states it operates in from 15 to four.[92] In their answer pleadings, both Aetna and Humana challenged the DOJ's "contrived market definition," indicating that Medicare Advantage and traditional Medicare are "functionally interchangeable substitutes." Humana challenged the DOJ's allegations of harm in the ACA exchanges on the basis that the markets are "highly volatile" and that current market performance is not a barometer for future competition.

On January 23, 2017, Judge John Bates ruled for the Department. Judge Bates questioned the synergies and innovation arguments, finding instead that the merger would be likely to substantially lessen competition in both Medicare Advantage markets and in the public insurance exchanges. On February 14, 2017, Aetna abandoned the transaction and paid Humana the $1 billion head up fee shortly thereafter.

(2) *Anthem/Cigna*

In the Anthem/Cigna case, the complaint alleged harm to competition in four markets: (1) national commercial health insurance accounts; (2) local commercial health insurance accounts; (3) individual exchanges; and (4) purchase of healthcare services by commercial insurers.

Of the "Big Five," only four offer a nationwide commercial network sufficient to serve the largest employers. Anthem and Cigna view each other as close competitors for each of these accounts and have adopted strategies for winning national business from each other. In 14 states, their combined market share is greater than 40% of national accounts.

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[91] Almost all of the 20 states required to approve the transaction had done so at the time the DOJ filed the Complaint.

[92] Press Release, Aetna Inc., *Aetna to Narrow Individual Public Exchange Participation* (Aug. 15, 2016), *available at* http://investor.aetna.com/phoenix.zhtml?c=110617&p=irol-newsArticle&ID=2195571. Apparently, on July 5, 2016, Aetna indicated to the DOJ that it would expand its participation in individual marketplaces to at least five more states if the deal was approved; however, if the DOJ sued, Aetna stated that it would withdraw its presence in all but 10 states.

Also, Anthem and Cigna are offering two of a few remaining options for large group employers in more than 35 metropolitan areas. The merger allegedly will slow down the much-needed transition to value-based contracting.

In at least two metropolitan areas—St. Louis and Denver—Aetna and Cigna are key competitors for selling policies to individuals and families on public exchanges. The complaint asserts that much of Cigna's growth has been at Aetna's expense. In both Colorado and Missouri, the parties are the second and third largest providers. In St. Louis, the combined firm would have 25% of all enrollees. There has been strong head-to-head competition between the two firms.

Finally, Anthem's high market share provides significant bargaining leverage with physicians and hospitals. In 35 metropolitan areas, the merger would significantly increase Anthem's ability to impact the reimbursement rates it pays providers. In addition, the complaint alleges that the merger would reduce innovation from the cooperative efforts with providers to enter into alternative models.

The complaint also rejects as a countervailing factor the extent to which Anthem anticipates lowering the reimbursement rates paid to physicians and hospitals for their services as a result of the merger. The reduction stems from a reduction of competition and may not be treated as efficiencies. Anthem apparently did not offer any remedies to the DOJ.

In a brief order issued August 12, 2016, Judge Judge Amy Berman Jackson set a trial date for November 21, 2016, with a conclusion by December 30, 2016. She provided the DOJ 10 days to present its case and gave Anthem six days.

On September 29, 2016, the DOJ indicated that it will not pursue claims in its case that the merger will harm competition in the sale of insurance policies to individuals through the ACA exchanges;[93] instead, the DOJ's case will focus on the potential reduction in competition in the sale of health insurance to national employers and to large-group accounts in 35 metropolitan areas.

On February 8, 2017, Jackson ruled for the DOJ, blocking the transaction on a finding that if allowed to proceed the combination would leave three insurance companies in several health insurance markets. In response, CIGNA and Anthem filed competing lawsuits concerning the obligations and conduct of each of the parties. In addition, Anthem appealed the district court's decision. On February 21, 2017, the court of appeals granted a motion for a speedy appeal.

f. *DOJ Sues to Block Merger of High-Speed Precision Planting System Companies*

On August 31, 2016, the DOJ sued in the Northern District of Illinois to enjoin the proposed acquisition of Precision Planting LLC ("Precision Planting"), a subsidiary of Monsanto Company, by Deere & Company ("Deere").[94] This challenge apparently occurred

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[93] Special Master Report and Recommendation No. 4, *U.S.* v. *Anthem, Inc*., No. 1:16-cv-1493, (D.D.C. Sept. 30, 2016).

[94] Complaint, *U.S.* v. *Deere & Co*., No. 1:16-cv-08515, (N.D. Ill. Aug. 31, 2016), *available at* https://www.justice.gov/opa/file/889071/download.

after the DOJ had cleared the transaction under the HSR Act, when, according to the transaction parties, the DOJ "changed its mind . . . when a Deere competitor protested." The DOJ alleges that Precision Planting and Deere are the only two significant U.S. providers of high-speed precision planting systems,[95] which involves a technology that allows farmers to plant crops accurately at high speeds. The complaint further indicates that high-speed precision planting is a "revolutionary technology that combines planting speed and accuracy"[96] that is characterized as a "True Game Changer for Agriculture,"[97] and is expected to become the industry standard in the future.

The complaint alleges that, if the deal were allowed to proceed, Deere would dominate the market and be able to raise prices and slow innovation at the expense of American farmers who rely on these systems. In fact, in evaluating the benefits of acquiring Precision Planting, Deere apparently estimated that eliminating competition from Precision Planting would allow it to avoid cutting its prices by 5% to 15%.[98] Combined, the parties account for at least 86% of the market. Moreover, the DOJ complaint dismisses the competitiveness of solutions offered by Kinze Manufacturing and Horsch, LLC as being comparable.[99] Moreover, while today Precision Planting licenses Case and AGCO with technology to retrofit their equipment to offer high-speed systems, the DOJ asserts that post-acquisition Deere would likely set the price, technology, and go-to-market timing of high-speed systems supplied to such competitors so as to not undercut its own planter sales, which would likely entrench Deere as the dominant provider of such systems, and limit competitive choices available to American farmers.[100]

2. *Consents*

In FY2016, the DOJ entered into 11 consents involving proposed transactions: (1) Springleaf Holdings, Inc./CitiFinancial Credit Company (personal installment loans);[101] (2)

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[95] The defendants in their answers to the complaint contend that high-speed precision planting systems is not a meaningful economic market, partly on the grounds that Precision Planting sells individually the components that the DOJ alleges comprise such a system.

[96] Complaint at ¶ 2.

[97] Complaint at ¶ 1.

[98] Complaint at ¶ 5.

[99] Complaint at ¶ 32.

[100] Complaint at ¶ 37. The transaction parties indicate that, as part of the deal, Ag Leader Technology will have the right to manufacture, sell, and even improve upon Precision Planting's products.

[101] Press Release, U.S. Dep't of Justice, *Justice Department Requires Springleaf to Divest 127 Branches in 11 States in Order to Complete Acquisition of OneMain Financial* (Nov. 13, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-requires-springleaf-divest-127-branches-11-states-order-complete. The DOJ required the divestiture of the branches, which accounted for over $600 million in personal installment loans for subprime borrowers, as a condition for Springleaf to proceed with its proposed $4.25 billion acquisition of OneMain Financial Holdings, LLC from Citigroup. According to the DOJ, without the divestiture, subprime borrowers who need these loans would face fewer choices in 126 local markets in 11 states (seven attorneys general joined in the suit and settlement). Springleaf and OneMain are the largest providers of personal installment loans to subprime borrowers, and the DOJ alleges that in these local markets they "operate branches in close proximity to one another—often within five miles—and face few, if any, other competitors." *Id.* The consent names Lendmark Financial Services as the upfront buyer.

AMC Entertainment Holdings Inc./SMH Theatres Inc. (movie theatres);[102] (3) Gray Television, Inc./Schurz Communication, Inc. (television stations);[103] (4) BBA Aviation plc/Landmark Aviation (airport fixed-base operator facilities);[104] (5) Iron Mountain Inc./ Recall Holdings Ltd. (records management assets);[105] (6) Charter Communications, Inc./ Time Warner Cable Inc./Advance/Newhouse Partnership (multichannel video programming

[102] Press Release, U.S. Dep't of Justice, *Justice Department Requires AMC Entertainment to Divest Two Movie Theaters in Order to Complete Acquisition of Starplex Cinemas* (Dec. 15, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-requires-amc-entertainment-divest-two-movie-theaters-order-complete. The acquisition involves AMC's acquisition of 33 movie theaters, with a total of 346 screens in 12 states. The DOJ's concerns were limited to two cities: according to the DOJ, AMC and Starplex Cinemas are each other's most significant competitors in Berlin, Connecticut and East Windsor, New Jersey, and the proposed acquisition would, therefore, be likely to reduce price competition and the overall quality of the movie-viewing experience. Under the consent decree, AMC would divest two Starplex theatres, one in each city. The Connecticut Attorney General joined in the settlement.

[103] Press Release, U.S. Dep't of Justice, *Gray Television Required to Divest Television Stations in South Bend, Indiana, and Wichita, Kansas, as Part of Schurz Communication Acquisition* (Dec. 22, 2015), *available at* http://www.justice.gov/opa/pr/gray-television-required-divest-television-stations-south-bend-indiana-and-wichita-kansas. As a condition to proceed with the acquisition of Schurz, Gray agreed to divest two television stations—the CBS affiliate in South Bend, Indiana and the ABC affiliate in Wichita, Kansas—to preserve head-to-head competition for local and national advertisers in these two markets.

[104] Press Release, U.S. Dep't of Justice, *BBA Aviation to Divest Facilities at Six Airports in Landmark Aviation Acquisition* (Feb. 3, 2016), *available at* http://www.justice.gov/opa/pr/bba-aviation-divest-facilities-six-airports-landmark-aviation-acquisition. The DOJ found that the transaction would have created a monopoly in fixed-base operator ("FBO") services at three airports and reduced the number of full-service FBO providers from three to two at three additional airports (with the third operator being much smaller than Landmark or BBA's Signature Flight Support). FBOs provide fuel and related support services to general aviation customers.

[105] Press Release, U.S. Dep't of Justice, *Iron Mountain and Recall Holdings Agree to Divest Records Management Assets as a Condition to Proceed with Transaction* (Mar. 31, 2016), *available at* https://www.justice.gov/opa/pr/iron-mountain-and-recall-holdings-agree-divest-records-management-assets-condition-proceed. Both Iron Mountain and Recall offer records management services ("RMS") in many cities in the United States. Under the consent, the parties will divest records management assets in 15 metropolitan areas where the parties are two of the three largest providers of these services and there are few, if any, significant remaining competitors. In all but Atlanta, the divestiture is of all of Recall's RMS assets; in Atlanta, the divestiture is of most, but not all, of Recall's RMS facilities because the facilities to be divested are sufficient to serve all of Recall's local customers in Atlanta and to compete for new business in the area. In each of these markets, the parties compete very closely for accounts, target one another's customers, and in most of the impacted markets, view one another as the other's most formidable competitor. Accordingly, the DOJ asserted that the resulting significant increase in concentration in each metropolitan area and the loss of head-to-head competition between the transaction parties likely would result in higher prices and lower-quality services for RMS customers. Entry was viewed as unlikely, given the significant time and capital required to successfully enter, including the difficulties in recouping the costs of entry due to the need to acquire customers from existing RMS vendors to fill the facility's capacity, which would be complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees and caps on the number of boxes per month that may be removed from the facility. In 13 of the 15 geographic areas, the divestiture is to an upfront buyer, Access CIG, LLC ("Access"), an established player in the RMS industry and currently the third largest RMS provider in the United States. Access already is a significant RMS provider in the remaining two geographic areas—Atlanta and Seattle—and thus a divestiture to Access in those areas would not restore the competition lost through the proposed acquisition. The parties have 90 days to divest the business in these two remaining areas to a buyer approved by the DOJ. The consent requires the defendants to release any "split multi-city customer" served by both merger parties from the controls to enable the customer to transfer records to the purchaser of the divested

distributors);[106] (7) Keycorp/First Niagara Financial Group Inc. (retail banks);[107] (8) GTCR Fund X/A AIV LP/UBM plc (media contact database);[108] (9) Huntington Bancshares Incorporated/FirstMerit Corporation (retail banking);[109] (10) Anheuser-Busch InBev/

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assets without paying any fees other than the costs of transporting the records from the facility and/or reshelving the records at the new facility.

[106] Press Release, U.S. Dep't of Justice, *Justice Department Allows Charter's Acquisition of Time Warner Cable and Bright House Networks to Proceed with Conditions* (Apr. 25, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-allows-charter-s-acquisition-time-warner-cable-and-bright-house-networks. The DOJ restricted the ability of New Charter in certain circumstances from entering into contracts with programmers that would impede online video distributors from obtaining video programming. New Charter is a multichannel video programming distributor that offers both broadband and video programming packages to consumers residing in its territory. According to the DOJ, as a larger multi-channel video programming distributor post-transaction, New Charter will have a greater ability and incentive to secure restrictions on programmers that limit or foreclose online video distributors access to important content so as to protect its video revenues. The consent has a seven-year term, which can be reduced after five years if the DOJ determines that its continuance is not necessary. The Federal Communications Commission approved the transaction on May 6, 2016, conditioned upon certain build-out commitments, limitations on the charging of interconnection fees, and restrictions on data caps for a seven-year period, unless New Charter is otherwise able to show such conditions unnecessary after five years.

[107] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Keycorp's Acquisition of First Niagara Financial Group Inc*. (Apr. 28, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-keycorp-s-acquisition-first-niagara-financial-group. The DOJ required that parties divest 18 of First Niagara's branches in the Buffalo, New York area in order to preserve retail banking services in that area. In addition, the companies agreed to sell or lease branches closed within two years of the consummation of the merger in the State of New York to other depository institutions and not to enter into any new non-compete agreement with their small business and middle-market relationship managers and their retail and branch managers for 180 days following the merger's consummation. According to one press report, the divestitures covered by the DOJ consent are smaller than the areas identified by Governor Andrew Cuomo and Congressman Brian Higgins. Pallavi Guniganti, *DoJ-ordered divestitures may fall short of addressing politicians' concerns*, GLOBAL COMPETITION REVIEW (Apr. 29, 2016), *available at* http://globalcompetitionreview.com/usa/article/40972/doj-ordered-divestitures-may-fall-short-addressing-politicians-concerns.

[108] Press Release, U.S. Dep't of Justice, *GTCR Agrees to Divest Third Largest Media Contact Database Provider in the U.S. in Order to Proceed With Acquisition of PR Newswire* (June 10, 2016), *available at* https://www.justice.gov/opa/pr/gtcr-agrees-divest-third-largest-media-contact-database-provider-us-order-proceed-acquisition. GTCR, a private equity firm, owns Cision, a leading public relations workflow software company and the largest media contact database provider, through its software suite. Public relations workflow software enables users to identify media contacts, monitor media coverage, and analyze a media company's performance. Media contact databases enable users to look up contact information for journalists and other influencers. They are essential for many large companies and PR agencies. PR Newswire is the third largest provider of workflow software, through its Agility workflow software suite. The DOJ found that the acquisition would have created a duopoly and further enhanced Cision's "dominant" market position. The merger, therefore, would have both unilateral and coordinated effects. The consent requires GTCR to divest Innodata Inc. The DOJ and the UK competition authority worked closely together on the review of this transaction.

[109] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Huntington Bancshares Incorporated's Acquisition of FirstMerit Corporation* (July 13, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-huntington-bancshares-incorporated-s-acquisition. Huntington agreed to divest two retail bank branches in Ashtabula County and 11 branches in Stark County, Ohio. In addition, the companies agreed to sell or lease branches closed within two years of the consummation of the merger in Ashtabula County or Stark County, Ohio to FDIC-insured depository institutions offering deposit and credit services to small businesses.

SABMiller (beer);[110] and (11) Nexstar Broadcasting Group Inc./Media General Inc. (broadcast television stations).[111]

3. *Abandoned Transactions*

On December 3, 2015, Thai Union Group Plc, owner of Chicken of the Sea, abandoned plans to merge with Bumble Bee Foods, LLC due to the DOJ informing the companies that it had serious concerns about the transaction.[112] The transaction parties were the second and third largest sellers of shelf-stable tuna in the United States, which, according to the DOJ, is "a market long dominated by three major brands" and that the parties were "the first and second largest domestic sellers of other shelf-stable seafood products." The DOJ further asserted that the "investigation convinced us—and the parties knew or should have known from the get-go—that the market is not functioning competitively today, and further consolidation would only make things worse."

Railroad transactions are subject to review by the Surface Transportation Board ("STB") (with input from the DOJ).[113] The DOJ provided input in FY2016 on the unsolicited bid by Canadian Pacific Railway Ltd. ("CP") for Norfolk Southern Corp. ("Norfolk Southern"). In early December 2015, Norfolk Southern rejected CP's $28.4 billion takeover bid, calling the unsolicited offer "grossly inadequate" and unlikely to obtain regulatory approval.[114] In 2016, CP undertook the unusual step of petitioning the STB for a declaratory order permitting a voting trust structure that would allow CP to pay Norfolk Southern shareholders before the deal closes and pending the STB's review of the transaction.[115] On April 8, 2016, the DOJ

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[110] Press Release, U.S. Dep't of Justice, *Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition* (July 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer. Contemporaneously with the announcement of the transaction, ABI announced its intention to divest SABMiller's entire U.S. beer business, including SABMiller's 58% ownership interest in MillerCoors. ABI agreed to divest as well the worldwide Miller beer brand rights. In addition, the consent prohibits ABI from: (1) instituting or continuing practices and programs that limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI's rivals; or (2) acquiring beer distributors or brewers without the DOJ's prior review of the transaction.

[111] Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Order for Nexstar to Proceed with Media General Acquisition* (Sept. 2, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-nexstar-proceed-media-general-acquisition. The DOJ conditioned its approval upon the divestiture of seven broadcast television stations to upfront buyers. The seven stations were among the 12 stations Nexstar had already agreed to divest to satisfy Federal Communications Commission concerns. The DOJ's concerns focused on the prices for broadcast television spot advertising and the fees charged to cable and satellite providers and other pay-TV programming distributors for the retransmission of broadcast television programming to pay-TV subscribers in six designated market areas.

[112] Press Release, U.S. Dep't of Justice, *Chicken of the Sea and Bumble Bee Abandon Tuna Merger After Justice Department Expresses Serious Concerns* (Dec. 3, 2015), *available at* http://www.justice.gov/opa/pr/chicken-sea-and-bumble-bee-abandon-tuna-merger-after-justice-department-expresses-serious.

[113] 49 U.S.C. § 11321 (1995).

[114] Chelsea Naso, *Norfolk Southern Snubs Canadian Pacific's $28B Takeover Bid*, LAW360 (Dec. 4, 2015), *available at* http://www.law360.com/articles/734237/norfolk-southern-snubs-canadian-pacific-s-28b-takeover-bid.

[115] Chelsea Naso, *Canadian Pacific Asks Regulator To OK Norfolk Bid Structure*, LAW360 (Feb. 16, 2016),

raised concerns regarding the structure, saying that it "made no sense" and would effectively undermine the independence of the two companies before a regulatory review could be completed and may risk harming competition. The voting trust would have allowed CP's CEO to become the CEO of Norfolk Southern. On April 11, 2016, CP abandoned its offer.[116]

4. *Transaction Restricted to Resolve Interlocking Directorate Concerns*

On November 11, 2015, ICAP proposed acquiring 19.9% of Trullett Prebon Group Ltd. ("Trullett") and having the right to nominate one member to Trullett's board of directors. Since both Trullett and ICAP compete in providing electronic brokerage services, the DOJ required that the acquisition agreement be revised to eliminate the right to nominate a member of Trullett's board of directors.[117]

1-II. Enforcement Trends and Issues

A. Pharma/Healthcare Active Areas of Investigation and Enforcement Action

Pharma/healthcare continued to be very active areas in FY2016, both in terms of volume of transactions and government enforcement actions. Both the FTC and the DOJ have been active in investigating and taking enforcement action in various sectors of this industry.[118] In the pharma sector, the FTC introduced additional theories of harm that deviated from well-established precedent. In addition, both agencies brought court challenges this year involving the healthcare sector.

In FY2014 and FY2015, the FTC required remedies in 13 pharmaceutical company mergers, three medical device combinations, and one laboratory products transaction. As in FY2015, over a third of the FTC's consents in FY2016 involved pharmaceutical transactions. In the last decade, the methodology applied to pharma mergers has become well developed, with a focus on possible overlaps in both branded and generic drugs, as well as generic overlaps in which the number of actual and potential competitors post-merger would be fewer than four or five firms. The life cycle stage of a particular drug treatment determines the FTC's focus. Some pharma deals involve overlaps at the development stages, *i.e.*, for a new therapeutic treatment for which there is no commercial product to date. Such "innovation market" challenges, involving actual competition for future products, are complex and involve judgment calls regarding likelihood, foreseeability, and a determination

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available at http://www.law360.com/articles/759319/canadian-pacific-asks-regulator-to-ok-norfolk-bid-structure; Press Release, U.S. Dep't of Justice, *Justice Department Opposes Canadian Pacific's Petition to Establish Voting Trust* (Apr. 8, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-opposes-canadian-pacific-s-petition-establish-voting-trust.

[116] Chelsea Naso, *Canadian Pacific Drops $30B Deal For Norfolk Southern*, LAW360 (Apr. 11, 2016), *available at* http://www.law360.com/articles/782780/canadian-pacific-drops-30b-deal-for-norfolk-southern.

[117] Press Release, U.S. Dep't of Justice, *Trullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates* (July 14, 2016), *available at* https://www.justice.gov/opa/pr/tullett-prebon-and-icap-restructure-transaction-after-justice-department-expresses-concerns.

[118] *See* Sharis A. Pozen, Former Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Competition And Health Care: A Prescription For High-Quality, Affordable Care*, Remarks as Prepared for the World Annual Leadership Summit on Mergers and Acquisitions in Health Care (Mar. 19, 2012), *available at* http://www.justice.gov/atr/public/speeches/281236.pdf, for a general overview of recent DOJ healthcare activity.

of what projects competing companies have in their pipelines.[119] Until the first generic is introduced into the market, competition may exist among competing branded drugs for a particular therapeutic treatment. Next, the competition focus shifts to the branded product and its generic bioequivalent, which gets approved into the marketplace through an abbreviated new drug application ("ANDA"). Many pharma deals involve a company without a commercially available product, but that is poised to enter the market—for instance, a company with a pending ANDA to introduce a generic version of the drug. Since all drug sellers must register with the FDA, the FTC is able to obtain information on who has applied to sell a drug, how far along they are in the pipeline, and what other companies are also pursuing approval. Such future competition is routinely analyzed in a merger review.

According to the FTC, once there are two or more generics available, a distinct generic market emerges in which the generic rivals set prices on the basis of other generic rivals, rather than relative to the branded product. The FTC also indicated that economic research establishes that with each additional generic, further price decreases will occur, although, once there are five to six generics in the marketplace, such benefits become less measurable. Also, once there are five or six generics on the market, research indicates that it is unlikely that the prices will go back to the level of the point when the fourth generic entered the marketplace even if a competitor is eliminated due to "stickiness" in pricing. As a result, in most cases, antitrust concerns in a generic-to-generic overlap will arise when: (1) one of the firms in the combination would have been a likely entrant with the fifth generic, since the merger would eliminate the benefit from such entry; (2) the merger will reduce the number of generics from five to four and the two parties account for a very large share of the generic sales of the drugs; or (3) the merger will reduce the number of generics from four to three. The inquiry is very fact-specific, with exceptions to the above that raise additional concerns, such as if the overlap involves an injectable form (in which case issues may arise, even in a six to five merger), branded generics play an important role in the market, or direct consumer marketing or physician preferences impact the interchangeability of branded and generic versions.

During FY2014 and FY2015, several FTC consents followed the same reasoning—requiring the merger parties to sell products or relinquish marketing rights in markets with four to three, three to two, and two to one competitors post-merger, as well as divestitures in markets in which the transaction parties are among a few firms with products in development.

The *Teva/Allergan* merger marked a departure in the review of generic pharma mergers, however, with the FTC also considering, in addition to the above-mentioned theories, whether the transaction potentially would create competitive concerns that extend beyond markets for individual pharmaceutical products. Specifically, the FTC considered whether

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[119] Ilene Knable Gotts & Richard T. Rapp, *Antitrust Treatment of Mergers Involving Future Goods*; ANTITRUST at 102 (Fall 2004), *available at* http://www.nera.com/content/dam/nera/publications/2004/Antitrust_Magazine_Fall_2004.pdf; Rosa M. Abrantes-Metz, Christopher P. Adams & Albert D. Metz, *Empirical Facts and Innovation Markets: Analysis of the Pharmaceutical Industry*, ANTITRUST SOURCE at 1 (Mar. 2005), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/06_mar05_abrametz323.authcheckdam.pdf.

the transaction would: (1) give the combined firm pricing power through the bundling of drug portfolios;[120] (2) affect incentives to challenge branded-drug patents;[121] and (3) discourage development of new generic products.[122]

From FY2013 through FY2015, the FTC challenged or took remedial actions in five hospital merger transactions, one surgical center combination, and a hospital system/physician group combination. The hospital challenges were protracted, with trials and appeals to federal circuit courts. As is true with most antitrust matters, market definition is often the critical determinant of whether the agencies will require relief, and, if challenged, whether the agency will prevail before the court. In healthcare cases, however, market delineation is often tricky due to such factors as the divergence between payor and physician/consumer and applicable regulatory regimes. Also, given the country's focus on healthcare reform, it is not surprising that hospitals have tried to assert quality and cost-savings objectives as defenses to a transaction.

As highlighted *supra*, in FY2016, the FTC brought three enforcement actions to challenge hospital mergers. In the first of these matters—Huntington Hospital's proposed acquisition of St. Mary's Medical Center in Huntington, West Virginia—the FTC had filed an administrative action, which it subsequently dropped due to the state action doctrine. Consistent with the lessons learned during the *Phoebe Putney* saga,[123] the FTC recognized its limits to challenge a merger that it believes will be anticompetitive when the state legislature has exercised its rights to displace competition with active state action.

In the second of these challenges—the proposed merger of Penn State and Pinnacle in the greater Harrisburg, Pennsylvania area—the district court denied the FTC's request for a PI, based on a finding that the FTC's geographic market was too narrow, only to be reversed by the Third Circuit. The appeals court's decision was important for a variety of reasons, including its validation of the FTC's methodology for identifying which hospitals commercial insurers need to include in their networks to be marketable to employers and their employees (*i.e.*, the appropriate way to apply the hypothetical monopolist test) in a rural hospital setting.

Finally, in the third hospital challenge—Advocate's proposed merger with NorthShore in the greater Chicago, Illinois area—the district court denied the PI on the basis that the FTC improperly excluded some North Shore-area hospitals, only to have the Seventh Circuit decide to reverse this decision on the basis of geographic market as well.

In addition to straightforward mergers between hospitals, hospitals increasingly are exploring ways of teaming up with physicians under a single corporate umbrella. As

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[120] For example, the FTC indicated that it considered whether a large portfolio of generic drugs could provide the merging company with a breadth of portfolio large enough to give it an advantage in winning business in individual drug product markets.

[121] For example, the FTC indicated that it looked at whether the deal would discourage the merged firm from filing patent challenges against branded drug makers.

[122] This third issue had been considered previously, and, among others, was the basis for the divesture in the *Ciba-Geigy/Sandoz* transaction.

[123] *FTC* v. *Phoebe Putney Health System, Inc*., 133 S. Ct. 1003, (2013), *available at* https://www.supremecourt.gov/opinions/12pdf/11-1160_1824.pdf.

then-FTC Competition Bureau Director Richard Feinstein indicated, "[s]uch arrangements have the potential to generate cost savings and quality benefits for patients, [but] in some cases, the arrangements can create highly concentrated markets that may harm consumers through higher prices or lower quality of care."[124] In June 2013, FTC Chairwoman Edith Ramirez pledged to use the FTC's unique research and policy roles to focus on issues associated with vertical mergers or other hospital acquisitions, noting "growing concerns" that provider consolidation may have negative price and quality effects for consumers, even if it does not affect competitors.[125]

Even combinations of specialty physician groups, particularly in rural areas, can raise concerns. In FY2016, for example, one of the consents involved a consummated combination of six independent orthopedic practices in Berks County, Pennsylvania. The FTC alleged that, pre-merger, health plans could choose among the individual practices.

The DOJ's merger enforcement activities in the healthcare sector have been predominantly in the health insurance sector. Former Acting Assistant Attorney General Sharis Pozen noted in a 2012 speech that the DOJ will be skeptical in accepting entry and expansion arguments as a constraint on the merged firm in health insurance mergers, specifically noting the "significant obstacle of scale."[126] In FY2013, the DOJ conditioned clearance of the *Wellpoint/Amerigroup* transaction on the divestiture of Amerigroup's Virginia subsidiary to Inova Health System Foundation.[127] The concerns raised by the DOJ involved the provision of Medicaid-managed plans in Northern Virginia; the merger parties were the only two providers of such services in the region. As in this matter, an upfront buyer is more likely to be needed to resolve health insurance concerns and to ensure that a divestiture package is viable.

As demonstrated in *BC Montana*[128] and in the FTC's extensive investigation of the *Express Scripts/Medco*[129] merger, the agencies in healthcare matters will include in their

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[124] *See* Joseph F. Wayland, Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust Policy In The Information Age: Protecting Innovation And Competition*, Remarks as Prepared for the Fordham Competition Law Institute (Sept. 21, 2012), *available at* http://www.justice.gov/atr/public/speeches/287215.pdf.

[125] Erica Teichert, *'Stay Tuned' For More Hospital Merger Battles: FTC Head*, LAW360 (June 28, 2013), *available at* http://www.law360.com/articles/454218/.

[126] Sharis A. Pozen, Former Acting Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Competition And Health Care: A Prescription For High-Quality, Affordable Care*, Remarks as Prepared for the World Annual Leadership Summit on Mergers and Acquisitions in Health Care at 7 (Mar. 19, 2012), *available at* http://www.justice.gov/atr/public/speeches/281236.pdf.

[127] Press Release, U.S. Dep't of Justice, *Amerigroup Corp.'s Divestiture of Its Virginia Operations Addresses Department of Justice's Concerns with Wellpoint Inc.'s Proposed Acquisition of Amerigroup* (Nov. 28, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/289428.htm.

[128] [Proposed] Final Judgment, *United States and State of Montana* v. *Blue Cross Blue Shield of Montana, Inc.*, *et al.*, No. 1:11-cv-00123 (D. Mont. Nov. 8, 2011), *available at* http://www.justice.gov/atr/cases/f277100/277165.pdf.

[129] *See also* Statement of the Fed. Trade Comm'n, *In the Matter of Caremark Rx, Inc./AdvancePCS*, File No. 031-0239 (F.T.C. Feb. 11, 2004), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2004/02/040211ftcstatement0310239.pdf. For a more in-depth discussion, *see* Rani Habash & John Scalf, *An Inside Look at Monopsony Issues in the FTC's Express Scripts-Medco Merger Investigation*, 26 ANTITRUST HEALTH CARE

considerations of a merger the potential adverse effects of increased power as a buyer. The 2010 Horizontal Merger Guidelines indicate that in evaluating a transaction's effects on the buying side of markets, the agencies "employ essentially the [same] framework" used to evaluate market power on the selling side.[130] The agencies recognize, however, that mergers resulting in decreased prices paid by the merged firm are not necessarily anticompetitive.

As discussed above, on July 21, 2016, the DOJ simultaneously sued to block Anthem's proposed acquisition of Cigna and Aetna's proposed acquisition of Humana. The two transactions, if consummated, would have reduced the number of big health insurance companies from five to three. The DOJ indicated that all four companies are successful providers that compete to provide Medicare Advantage services and sell health insurance on the ACA public exchanges. In addition, Anthem and Cigna are two of only four large providers of local and nationwide commercial health insurance with networks sufficient to serve large group employers. Anthem and Cigna are offering two of the few remaining options for these employers in 35 metropolitan areas. Key to these cases will be the market definitions adopted by the courts.

B. The Agencies—and the Courts—Focus on Merger Remedies

Both the FTC and the DOJ have consistently focused on remedies and required comprehensive divestiture packages to resolve their concerns.[131] In addition, many of the

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CHRONICLE 24 (Sept. 2012), *available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_AT_HC_Chronicle_0912.pdf. *See also* Complaint, *United States* v. *Aetna, Inc*., No. 3-99 CV 1398-H (N.D. Tex. June 21, 1999), *available at* https://www.justice.gov/atr/case-document/complaint-1; Marius Schwartz & Susan M. Davies, *Monopsony Concerns in Merger Review*, AMERICAN BAR ASSOCIATION ANTITRUST SECTION, 2 CLAYTON ACT COMMITTEE NEWSLETTER 19 (Winter 2002).

[130] U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[131] To support these efforts, the FTC also announced plans to conduct a "merger retrospective" to determine the effectiveness of remedies imposed in some of the prior mergers. Press Release, Fed. Trade Comm'n, *FTC Proposes to Study Merger Remedies* (Jan. 9, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies. In total, the FTC studied 92 merger orders issued by the FTC between 2006 and 2012. The study included interviews of the buyers of divested assets, significant competitors in each market, and customers. Part of the attention on remedies may be attributed to the reasons that the FTC considers resulted in two of its divestiture sales being unsuccessful. The first of these reported "failures" occurred in connection with the FTC's November 2012 order that Hertz sell its Advantage low-cost rental business and rights to operate 29 Dollar Thrifty airport locations in order to gain clearance of its $2.3 billion acquisition of Dollar Thrifty. Hertz sold the business to Simply Wheelz, a subsidiary of Franchise Services of North America, which at that time operated U-Save Car Rental. The divestiture acquisition occurred in early 2013. As part of the acquisition, Simply Wheelz opted to lease 24,000 vehicles from Hertz under an agreement that required Simply Wheelz to auction off the cars by the end of 2014, and if sold for less than Hertz's claimed value, to pay Hertz the difference.

The FTC issued its final order on July 10, 2013; four months later, on November 5, 2013, Simply Wheelz filed for bankruptcy, reportedly in part due to Hertz's exercise of its right to terminate its fleet-leasing arrangement with Advantage, since Advantage owed Hertz in excess of $39 million. In January 2014, the FTC sought public comments on the sale of the bankrupt Advantage Rent-a-Car operations to Catalyst Capital Group ("Catalyst"), a private equity firm, which would purportedly need to spend more than $100 million on Advantage to acquire a new fleet of rental vehicles. The FTC approved the sale on January 30, 2014. Catalyst opted to operate only 40 of the 70 locations available for purchase. Ultimately the bankruptcy court put 22 of these locations up for bid.

litigated matters were initiated after the agencies rejected the remedies proposed by the transaction parties. In some of those cases, the court was asked to review the adequacy of these remedies.

The Obama Administration provided guidance on its views of merger remedies on June 17, 2011, when the DOJ issued an updated policy guide:

> The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. . . . In horizontal merger matters, structural remedies often effectively preserve competition, including when used in conjunction with certain conduct provisions. Structural remedies may be appropriate in vertical merger matters as well, but conduct remedies often can effectively address anticompetitive issues raised by vertical mergers. In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare.[132]

Recent precedent includes the agencies imposing a variety of behavioral conditions to support a structural divestiture. Transition services arrangements and supply arrangements have been more routinely included, beyond the pharmaceutical industry where they had already been the norm.[133] In FY2016, for instance, the FTC required that ArcLight augment its sale of terminals with requirements that it (1) maintain minimum throughput volumes at the terminals for two years; and (2) supply the divestiture buyer with renewable fuels that may be blended with LPPs for five years. Mandatory licensing provisions may also alleviate competitive concerns by enabling competitors access to a key input;[134] some of the consents, however, include not only a license for technology, but the right to purchase the technology

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Hertz and Avis were awarded 10 and 12 sites, respectively. These sites had been closed for months prior to being auctioned off; without these divestitures, the sites were likely to have exited the market. In light of the circumstances, the FTC permitted Hertz to reacquire the sites.

A second "failed" divestiture has arisen in connection with the divestiture of 146 supermarkets to Haggen Holdings, LLC ("Haggen") on January 27, 2015 to resolve concerns about Albertsons' acquisition of Safeway. On August 14, 2015, Haggen announced that it would close 27 acquired stores and, on September 8, 2015, Haggen filed for Chapter 11 bankruptcy to permit it to reorganize with only its core profitable stores. On September 24, 2015, Haggen announced that it would exit from California, Arizona, and Nevada, and continue to operate only 37 stores. Haggen, Cerberus International, and Safeway petitioned the FTC on September 23, 2015, seeking approval on an expedited basis of a modification of the consent to permit Albertsons to rehire Haggen employees who were being terminated by Haggen, without violating the consent order. The FTC had no choice but to grant this request.

[132] U.S. Dep't of Justice & Fed. Trade Comm'n Antitrust Division, *Horizontal Merger Guidelines* (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[133] *See, e.g.*, Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Order for Regal Beloit Corporation to Proceed with Its Acquisition of A.O. Smith Corporation's Electric Motor Business* (Aug. 17, 2011), *available at* http://www.justice.gov/opa/pr/2011/August/11-at-1056.html; Hold Separate Stipulation and Order, *United States* v. *Bemis Co., Inc., et al.*, No. 1:10-cv-00295 (D.D.C. July 13, 2010), *available at* http://www.justice.gov/atr/cases/f255700/255715.htm.

[134] *See, e.g.*, Press Release, U.S. Dep't of Justice, *Justice Department Requires Google Inc. to Develop and License Travel Software in Order to Proceed with Its Acquisition of ITA Software Inc*. (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-at-445.html; Press Release, U.S. Dep't of Justice, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 18, 2011), *available at* http://www.justice.gov/opa/pr/2011/January/11-at-061.html.

or to transfer the license to a third party later.[135] In addition, non-discrimination provisions have been included to incorporate the concepts of equal access, equal effort, and equal terms.

Similarly, the FTC's *CoStar/LoopNet* consent contained what the FTC characterized as "conduct relief that is unusual in a merger settlement."[136] In addition to requiring that the parties divest LoopNet's interest in Xceligent, a competing database that the FTC considered to be the "most similar competitor for information services" to CoStar, the consent also "imposes certain conduct requirements to assure the continued viability of Xceligent as a competitor to the merged firm and to reduce barriers to competitive entry and expansion. These additional provisions will facilitate Xceligent's geographic expansion and prevent foreclosure of [the parties'] established customer base." For five years, the consent (1) prohibits CoStar and LoopNet from restricting customers' ability to support Xceligent; (2) requires CoStar and LoopNet to allow customers to terminate their existing contracts, without penalty, with one year's prior notice;[137] and (3) bars the merged firm from requiring customers to buy any of its products as a condition for receiving other products, and from requiring customers to subscribe to multiple geographic coverage areas to gain access to a single area in which they are interested. In addition, the consent requires, for three years, that CoStar and LoopNet continue to offer their customers core products on a stand-alone basis. A related provision prohibits the parties from limiting use of Xceligent's REApplications product, a software tool for managing market research in connection with customers' purchase, lease, or license of CRE database services from competitors.

There have also been situations recently in which the agencies have required divestitures to include out-of-market assets (*i.e.*, a divestiture package that goes beyond the assets in the relevant market).[138] In *Community Health Systems/Health Management Associates*,[139] the FTC's concerns were focused on general acute care inpatient hospital services sold to commercial health plans in two geographic areas; the FTC, however, required that Community Health Systems include in the divestiture package the hospital facilities and all outpatient services and operations that were affiliated with the hospital, regardless of whether those services were provided at the hospital. The FTC viewed the outpatient business as necessary for the buyer of each hospital to be as effective a competitor as Health Management Associates had been prior to the transaction.

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[135] *See, e.g.*, Proposed Final Judgment, U.S. Dep't of Justice, *United States* v. *Cameron Int'l Corp., et al.*, No. 1:09-cv-02165 (D.D.C. Nov. 17, 2009), *available at* http://www.justice.gov/atr/cases/f252000/252080.htm.

[136] Press Release, Fed. Trade Comm'n, *FTC Places Conditions on CoStar's $860 Million Acquisition of LoopNet* (Apr. 26, 2012), *available at* http://www.ftc.gov/opa/2012/04/costar.shtm.

[137] Similarly, the *ArcLight/Gulf* consent requires that ArcLight and Gulf customers in the relevant markets be able to cancel their terminaling service contracts without penalty for six months after the divestiture.

[138] For a discussion of remedies, including out-of-market assets from the FTC's perspective, *see* Dan Ducore, Bureau of Competition, *Divestitures may include assets outside the market* (Apr. 24, 2015), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2015/04/divestitures-may-include-assets-outside-market.

[139] Press Release, Fed. Trade Comm'n, *FTC Requires Community Health Systems, Inc. to Divest Two Hospitals as a Condition of Acquiring Rival Hospital Operator* (Jan. 22, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/01/ftc-requires-community-health-systems-inc-divest-two-hospitals.

Also, in *Sun Pharmaceutical/Ranbaxy*,[140] the FTC required the firms to sell assets related to three dosages of generic minocycline capsules on the premise that the combination would impact future competition for three strengths of generic minocycline tablets used to treat a variety of infections. The FTC's rationale for including the capsules was that it would allow the upfront buyer to use a shorter FDA regulatory process because it would control both products and use the same ingredient supplier (API).

In *Holcim/Lafarge*,[141] the FTC conditioned clearance on the divestiture of plants and terminals, including a terminal in Alberta, Canada and a cement plant in Ontario, Canada. Canadian assets that are named in the FTC consent decree were included by the FTC as necessary to remedy competitive concerns in northern U.S. markets.

In *ZF Friedrichshafen AG/TRW Automotive Holdings Corp.*,[142] the FTC conditioned approval of a $12.4 billion merger that would create the world's second largest auto parts supplier with the divestiture of TRW's linkage and suspension business in North America and Europe, even though only suppliers that have production facilities in the United States, Canada, and Mexico were deemed eligible to compete for U.S. business.[143] Also, in *NXP Semiconductors*, the parties agreed to divest all NXP assets that are used primarily for manufacturing, research, and development of RF power amplifiers, including a manufacturing facility in the Philippines, a building in the Netherlands to house management and some testing labs, as well as all patents and technologies used exclusively or predominantly for the RF power amplifier business, based on the finding that the market for RF power amplifiers is worldwide. The FTC worked with the staff of the antitrust agencies in the European Union, Japan, and Korea on all aspects of the analysis, including potential remedies, in order to reach compatible approaches on an international scale.

The agencies have also taken a more expansive stance in transactions involving innovation and future generations of products. For instance, the DOJ recently announced that Applied Materials Inc. and Tokyo Electron Ltd. had abandoned their merger plans after the DOJ informed them that their remedy proposal had failed to resolve the competitive concerns.[144] Although the merger parties had reportedly offered to divest the overlapping etching and depositing business line of Tokyo Electron, the DOJ thought the package did not adequately

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[140] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Sun Pharmaceutical's Proposed Acquisition of Ranbaxy* (Jan. 30, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/01/ftc-puts-conditions-sun-pharmaceuticals-proposed-acquisition.

[141] Press Release, Fed. Trade Comm'n, *FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition of Merger* (May 4, 2015), *available at* http://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets.

[142] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Merger of Auto Parts Suppliers ZF Friedrichshafen AG and TRW Automotive Holdings Corp*. (May 5, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf.

[143] As noted in the *Director's Report Spring 2016*, the EC had determined as well that the merger would reduce competition in the chassis components for cars and trucks market. The broader divestiture resolved concerns in both jurisdictions.

[144] Press Release, U.S. Dep't of Justice, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy* (Apr. 27, 2015), *available at* https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department.

address the future impact of the deal on innovation in future generations of semiconductor equipment. Similarly, in the *Nielsen/Arbitron* transaction, the FTC focused on protecting a future market for syndicated audience cross-platform measurement services. The consent conditioned that transaction's approval on Nielsen's obligation to (1) continue its cross-platform project with ESPN Inc. and comScore, Inc.; and (2) license Arbitron's Portable People Meter and related data, as well as software and technology being used in the ESPN project, to an FTC-approved third party for up to eight years.[145]

The same is true in consummated merger challenges. In both *Chicago Bridge*[146] and *Polypore*,[147] the FTC required the parties to include assets outside of the market to restore competition within the relevant market and to provide the divestiture buyer with the ability to compete. More recently, in *Valeant*,[148] the FTC required Valeant not only to divest the entire hard contact lens business it had acquired from Paragon Holdings in 2015, but also assets it had later acquired that the FTC deemed necessary to ensure that the divested business will continue to have access to the vials it needs for its finished lens business.[149]

Both agencies have also increasingly required that the parties identify an acceptable "upfront buyer" before accepting divestiture packages. The "upfront buyer" requirement is justified by the agencies as being necessary to ensure that the divestiture will be effective in maintaining competition at the same level as it had been pre-transaction. The transaction parties, however, can face substantial delay from the process: the need to identify a divestiture buyer, negotiate a divestiture agreement, and have that buyer and the divestiture package vetted by the agencies before the main transaction is permitted to proceed can literally add months to the review process.

Moreover, as mentioned above, the agencies have been willing to challenge transactions in which the parties have offered large divestiture packages. In a recent FTC blog, the authors distinguished the divestiture package offered by *Superior/Canexus* from the package offered in *Ball/Rexam*:

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[145] Press Release, Fed. Trade Comm'n, *FTC Puts Conditions on Nielsen's Proposed $1.26 billion Acquisition of Arbitron* (Sept. 20, 2013), *available at* http://www.ftc.gov/opa/2013/09/nielsen.shtm. Commissioner Wright dissented from the decision on the basis that the future market theory should be subject to a higher evidentiary standard. *See* Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc*., FTC No. 131-0058 (Sept. 20, 2013), *available at* http://www.ftc.gov/os/caselist/1310058/130920nielsenarbitron-jdwstmt.pdf.

[146] FTC Opinion, *In re Chicago Bridge & Iron Company*, FTC Docket 9300 (Jan. 6, 2005), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2005/01/050106opionpublicrecordversion9300_0.pdf?utm_source=govdelivery.

[147] FTC Opinion, *In re Polypore International, Inc*., FTC Docket 9327 (Dec. 13, 2010), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf?utm_source=govdelivery.

[148] Agreement Containing Consent Order, *Valeant Pharmaceuticals Int'l, Inc*. (Nov. 7, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/161107_paragon_pelican_agreement_2.pdf.

[149] The proposed revisions to the *Antitrust Guidelines for International Enforcement and Cooperation* also indicate that the agencies will seek a remedy that involves conduct or assets outside the United States if they deem that doing so is necessary to ensure the remedy's effectiveness and is consistent with the agencies' international comity analysis.

> [In *Superior*,] the Commission determined it had reason to believe that the acquisition even with the proposed divestitures would still result in competitive harm. . . . Though substantial, none of the various proposals included the right package of plants and other assets to fully eliminate both output suppression and coordination concerns with the underlying merger. . . . [In contrast, in *Ball/Rexam*, the sale of assets to Ardagh] would make it the third largest producer in the United States and the world. . . . Its entry as a substantial and viable competitor remedies both unilateral and coordinated concerns with the underlying mergers while still allowing Ball to achieve beneficial efficiencies through its acquisition of Rexam.[150]

As discussed above, the DOJ rejected the large divestiture package offered by the parties in the *Halliburton/Baker Hughes* merger and highlighted the agency's requirement that the divestiture must preserve competition in every market that the merger affects. The agencies will be skeptical of packages that entail "piecemeal" assets and entanglements between the parties. More recently, the DOJ rejected the divestiture package offered by Aetna/Humana. Although in the *Halliburton/Baker Hughes* case the parties abandoned the merger prior to trial, in a number of recent merger challenges, the defendants have instead sought to "litigate the fix" by proposing a divestiture remedy for the court to consider when deciding whether to block the consummation of the transaction.[151]

This strategy is not a new one. In *Libbey*, the defendant, as a party to a merger agreement, amended its agreement after the FTC challenged its merger with a competitor.[152] Although the amended agreement stated that it "supersede[d] all prior agreements," the FTC advocated that the court evaluate the original agreement in deciding whether an injunction should be issued.[153] The court disagreed, holding that "parties to a merger agreement that is being challenged by the government can abandon that agreement and propose a new one in an effort to address the government's concerns." The court further held that when parties so amend a merger agreement, a court must evaluate the new agreement in deciding whether an injunction should be issued.[154]

In 2004, the same court applied *Libbey* in the *Arch Coal* ("Arch") case.[155] In that case, the merging parties, prior to the FTC's administrative complaint, had structured their merger to include two separate transactions: (1) the acquisition by Arch of Triton Coal Co. ("Triton"), including both of its mines in the Southern Powder River Basin of Wyoming; and (2) the

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[150] Sean Sullivan & Ben Gris, *What does it take to settle a merger case?*, Fed. Trade Comm'n (July 22, 2016), *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2016/07/what-does-it-take-settle-merger-case.

[151] *See, e.g.*, Complaint, *U.S.* v. *Halliburton Co*., No. 1:16-cv-00233 (D. Del. Apr. 6, 2016), *available at* https://www.justice.gov/opa/file/838651/download; Complaint, *United States* v. *Aetna Inc*., No. 3-99 CV 398-H (N.D. Tex. June 21, 1999), *available at* https://www.justice.gov/atr/case-document/complaint-1; Complaint, *FTC* v. *Staples, Inc*., No. 1:15-cv-02115 (D.D.C. Dec. 9, 2015), *available at* http://res.cloudinary.com/gcr-usa/image/upload/v1449787115/FTCvStaplesfedctcomplaint_paudu1.pdf.

[152] *FTC* v. *Libbey, Inc*., 211 F. Supp. 2d 34 (D.D.C. 2002).

[153] *Id.* at 46.

[154] *Id.*

[155] *FTC* v. *Arch Coal, Inc*., Civ. A. No. 04-0534 (D.D.C. Aug. 16, 2004) (memorandum opinion denying complaint counsel's motion in limine).

subsequent sale, contingent upon the consummation of the merger, of one of Triton's mines to a third party, Peter Kiewit Sons', Inc. ("Kiewit"), which Arch had entered into during the FTC's investigation and prior to any litigation. The FTC filed a motion in limine to exclude for purposes of the PI hearing all evidence of the planned post-merger sale of the Triton mine to Kiewit. The FTC argued that the sale was simply the parties' proposed remedy to the merger that the FTC had challenged, and was not an integral part of the transaction properly before the court. The court disagreed. "[T]he Court does not find this structural choice to be dispositive on the issue whether the Kiewit transaction should be considered in the preliminary injunction proceeding." In *Libbey*, the court noted that, even after the parties had amended their merger agreement, the FTC remained capable of vetting the amended agreement and had in fact voted to enjoin the amended merger agreement that the FTC was challenging and that was properly before the court for review on the FTC's motion for PI.[156] Here, as well, Arch informed the FTC that it had signed an agreement with Kiewit and the FTC then issued its administrative complaint challenging the merger, "determin[ing] that the competitive concerns posed by Arch's acquisition of Triton were not remedied by Arch's offer to sell . . . to Kiewit." FTC Mot. at 4. Thus, the FTC has assessed and is in reality challenging the merger agreement, including the Kiewit divestiture.[157] The court rejected the FTC's allegations that the merger would nevertheless increase the risk of coordination. Instead, the court considered the impact of the divestiture on market shares, and even credited the divestiture buyers' plans to expand the mine's output.

In *CCC Holdings*, the court considered—but rejected—the effectiveness of a licensing agreement with a third company, Web-Est, that the transaction parties asserted would enhance the competitiveness of an existing competitor by eliminating existing restrictions on Web-Est's ability to compete and would allegedly allow Web-Est to replace competition lost from the transaction.[158] The court determined that it can be a "problem" to allow "continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior."[159]

Moreover, it is not enough to indicate during a pending court proceeding that the transaction will be restricted and that the firm *will sell* assets to a single buyer as "a new, unified business."[160] In *Ardagh*, the judge concluded that it was "premature and precipitous" to consider the proposal and doubted that the proposal could be thoroughly studied in the three weeks remaining before the hearing of the PI.[161]

In FY2015, in the *Sysco* case, the transaction parties had entered into an agreement to divest significant assets to Performance Food Group ("PFG") to eliminate the competitive

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[156] *Libbey*, 211 F. Supp. 2d at 46.

[157] *Id.* at 4–5.

[158] *FTC* v. *CCC Holdings, Inc.*, 605 F. Supp. 2d 56–59 (D.D.C. 2009).

[159] *Id.*, 605 F. Supp. 2d at 59.

[160] Brian Mahoney, *Deal In Ardagh's $2B Merger Left Out Of FTC Case, For Now*, LAW360 (Sept. 24, 2013), *available at* https://www.law360.com/articles/475274/deal-in-ardagh-s-2b-merger-left-out-of-ftc-case-for-now.

[161] *Id.*

concerns raised by the proposed transaction. After noting that there is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger,[162] the court reviewed the testimony and documents and found the divestiture lacking. Specifically, the court is "not persuaded that . . . a sufficient number of national customers will view PFG as a viable alternative to the merged entity 'on day one' to maintain the intensity that characterizes the present competition between Sysco and USF."[163] The court finds that, as with *CCC Holdings*, the transition services agreement provided that PFG would provide access to USF private label products for three years, and the right to license USF's database for at least five years, with a continuing option for five more years. The court concluded that "PFG, therefore, [would] not be a truly independent competitor."[164]

Similarly, the court rejected the commitments of the buyer in a proposed stipulation filed just before trial not to engage in certain conduct in *OSF Healthcare*.[165] Although the court found that the stipulation addressed some consensus, it determined that the provisions did not fully address the concerns because "it does not specifically preclude price increases or otherwise limit the ability . . . to exercise market power in order to achieve higher prices."[166] Finally, as mentioned above, the court considered—but rejected as inadequate—the divestitures offered by the parties in the *Staples/Office Depot* case.

The same principle applies to the DOJ's merger challenges. In *United States* v. *Franklin Electric Co.*, the DOJ challenged a joint venture under Section 7 of the Clayton Act. The district court in that case also rejected the DOJ's argument that the court should not consider the defendants' proposed transaction to resolve the government's antitrust concerns.[167] However, the proposed remedy in *Franklin Electric* was found to be inadequate to resolve concerns raised by the proposed merger. More recently in the *Aetna/Humana* case, the judge found the divestitures offered inadequate to address the likely adverse effects of the transaction.

1-III. HSR Enforcement and Procedural Developments

A. Len Blavatnik Agrees to Pay $656,000 in Civil Penalties

On October 6, 2015, the FTC entered into an agreement requiring Len Blavatnik to pay $656,000 in civil penalties to settle charges that he violated the HSR Act when he failed to report the acquisition of $228 million of voting securities in TangoMe by his company, Access Industries, in August 2014.[168] Mr. Blavatnik had previously violated the HSR Act

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[162] *FTC* v. *Sysco Corp.*, 113 F. Supp. 3d (D.D.C. 2015).

[163] *Id.* at 76.

[164] *Id.* at 78.

[165] *FTC* v. *OSF Health Sys.*, 852 F. Supp. 2d (N.D. Ill. 2012).

[166] *Id.* at 1085.

[167] *United States* v. *Franklin Elec. Co.*, Civ. A. No. 00-C-334-C (W.D. Wis. July 17, 2000) (order denying the plaintiff's motion in limine).

[168] Press Release, Fed. Trade Comm'n, *Investor Len Blavatnik to Pay $656,000 to Settle FTC Charges That He Violated U.S. Premerger Notification Requirements* (Oct. 6, 2015), *available at* https://www.ftc.gov/news-

when he bought shares of LyondellBasell Industries, N.V. in 2010 and, at that time, apparently made representations to the FTC that he would discuss reportability with HSR Act counsel prior to any future acquisitions. The FTC indicates that, despite this commitment, Mr. Blavatnik failed to consult HSR Act counsel prior to the acquisition of the TangoMe shares.

B. ValueAct Settles HSR Act Violation Case with $11 Million Payment

On April 4, 2016, the DOJ filed a lawsuit in the Northern District of California charging ValueAct Capital Funds ("ValueAct"), an activist investment firm, with violating the HSR Act in connection with its $2.5 billion in purchases of shares of Halliburton and Baker Hughes.[169] ValueAct's acquisitions comprised less than 10% of the voting securities of each company, which suggests that ValueAct did not file the HSR Act notification for these purchases based on its reliance upon the "investment-only" exemption.[170] The DOJ's complaint alleges that ValueAct's actions and statements of intention—including meeting with both management teams, advocating to other shareholders to vote in favor of the proposed merger, promoting specific integration plans and executive compensation strategies, and proposing operational and strategic changes at Baker Hughes—were inconsistent with investment-only intent.[171] The DOJ's complaint also named ValueAct's general partner as a defendant.

ValueAct has previously been found to have violated the HSR Act by failing to file notifications for prior acquisitions, including one that settled for $1.1 million in 2007.[172] The DOJ's complaint sought the maximum fine of $19 million and an injunction against future violations. Although ValueAct indicated at the time the suit was filed that it intended to fight the action, it settled with the DOJ three months later, by agreeing (1) to pay a record fine of $11 million; and (2) to be enjoined from relying on the "investment-only" exemption when it intends to influence, or is considering influencing, certain basic decisions, including those relating to acquisition strategy, corporate restructuring, and the company's pricing, production capacity, or production output.

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events/press-releases/2015/10/investor-len-blavatnik-pay-656000-settle-ftc-charges-he-violated.

[169] Complaint, *United States* v. *VA Partners I, LLC, et al.*, No. 3:16-cv-01672 (N.D. Cal. Apr. 4, 2016), *available at* https://www.justice.gov/atr/file/838076/download.

[170] Under the HSR Act and rules, an "investment-only" exemption exists for acquisitions of up to 10% of the stock of a company if the purchases are made solely for the purpose of investment and the buyer "has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 802.10 (2016). HSR Act requirements have historically been enforced strictly and narrowly against public companies, officers, directors and investors, without deference to any particular class of violator. In recent years, the agencies have become more active in policing the HSR Act abuses of activist hedge funds, including against Biglari Holdings in 2012 and Third Point in 2013. *See* Nelson O. Fitts, Sabastian V. Niles, and Franco Castelli, *FTC Charges Activist Hedge Fund*, 55 BANK AND CORPORATE GOVERNANCE LAW REP. 196 (Aug. 2015), *available at* https://corpgov.law.harvard.edu/2015/08/27/ftc-charges-activist-hedge-fund/.

[171] Complaint, *United States* v. *VA Partners I, LLC*, No. 3:16-cv-01672 (N.D. Cal. Apr. 4, 2016), *available at* https://www.justice.gov/atr/file/838076/download.

[172] Press Release, Fed. Trade Comm'n, *FTC Obtains $1.1 Million Civil Penalty for Pre-Merger Filing Violations* (Dec. 19, 2007), *available at* https://www.ftc.gov/news-events/press-releases/2007/12/ftc-obtains-11-million-civil-penalty-pre-merger-filing-violations.

C. Caledonia Investments PLC to Pay $480,000 in Civil Penalties

On August 10, 2016, the FTC announced that Caledonia Investments PLC ("Caledonia") will pay $480,000 in civil penalties to settle allegations that it violated the HSR Act when it acquired $111 million of voting securities of Bristow Group Inc. ("Bristow") in 2014.[173] Caledonia first acquired voting securities in Bristow in 2008 and filed an HSR Act notification at that time. It had made additional purchases in Bristow that were exempt from reporting. Two Caledonia employees were designated to serve on Bristow's board and were awarded restricted-stock voting securities. When those shares vested in 2014, Caledonia acquired them without reporting the transaction. Caledonia made a corrective filing in February 2015, *i.e.*, approximately one year after the acquisition. The FTC pursued civil penalties because Caledonia had previously violated the HSR Act in 1996.

D. Defense Industry Transactions

On April 12, 2016, the DOJ and the FTC issued a joint statement on preserving competition in the defense industry.[174] The agencies committed to giving the assessment by the U.S. Department of Defense ("DOD") "substantial weight in areas where DOD has special expertise and information, such as national security issues." In addition, the agencies indicated that they are committed to preserving competition in the defense industry and closely reviewing mergers and acquisitions in that sector on a case-by-case basis under existing antitrust law in cooperation with the DOD.

The joint statement appears to be in response to a statement issued by the DOD in September 2015 reacting to Lockheed Martin Corp.'s acquisition of Sikorsky.[175] The DOD reportedly recognized that the Lockheed/Sikorsky deal did not raise concerns under existing law, but, among other things, noted that the transaction resulted in "the most significant change at the weapon system prime level since the large-scale consolidation that followed the end of the Cold War."[176] The DOD raised as a general matter concerns about consolidation of the defense industrial base and the DOD's lack of authority to stop acquisitions that it believes might be detrimental to affordability and innovation in defense markets. The DOD also indicated that it intended to work with Congress on new legislation to ensure that these objectives are met.

Conclusion

FY2016 marked an uninterrupted eight-year course of U.S. antitrust enforcers aggressively enforcing the antitrust laws and seeking to have a permanent marker of antitrust law

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[173] Press Release, Fed. Trade Comm'n, *Investment Trust to Pay $480,000 to Settle FTC Charges It Violated U.S. Premerger Notification Requirements* (Aug. 10, 2016), *available at* https://www.ftc.gov/news-events/press-releases/2016/08/investment-trust-pay-480000-settle-ftc-charges-it-violated-us.

[174] U.S. Dep't of Justice & Fed. Trade Comm'n, *Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry* (Apr. 12, 2016), *available at* https://www.justice.gov/opa/file/863246/download.

[175] This transaction was vertical in nature and did not raise sufficient issues to warrant the issuance of a second request.

[176] Andrea Shalal & Yeganeh Torbati, *UPDATE 1-Pentagon warns against further consolidation among big arms makers*, Reuters (Sept. 30, 2015), *available at* http://www.reuters.com/article/usa-defense-ma-idUSL1N1202FW20150930.

precedent through the court decisions the agencies obtained. The two victories at the appellate level involving hospital combinations this year illustrate this potential for long-term impact in the courts' discussion of the hypothetical monopolist test to delineate geographic market definitions. Similarly, the *Staples* decision this year and the *Sysco* decision last year were noteworthy both in their recognition of a separate market for large national customers as well as rejection of the remedy offered by the transaction parties. The election's impact on the three pending court challenges may depend upon the timing and outcome of the court decision.

Of potentially less precedential impact will be the transactions that were abandoned by the parties due to enforcement challenges and the terms of the consents entered into by parties to avoid challenge. The leadership at the DOJ will almost certainly have their own views of enforcement and will apply those views in deciding which cases to bring and which remedies to accept. Although the composition of the FTC's Commission will change more slowly, the Trump administration will get to choose a new Chairman (subject to Senate confirmation), and the Chairman will select the Director of each of the FTC's bureaus.

The Trump administration has provided no guidance to date regarding its views of antitrust enforcement or the individuals who will be chosen to lead the agencies. Nonetheless, changes in administrations typically do not impact the vast majority of transactions reviewed by the agencies. The leadership tends to leave their mark on the closer decisions, and, as suggested above, the remedies imposed to avoid challenges. There may be some indications prior to the Inauguration, but more likely it will be Spring 2017 before the business and legal community has clarity on the leadership and policies that will be implemented during the next four years.