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The Mergers &
Acquisitions Committee

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FROM THE CHAIR

To All Committee Members:

Welcome to the Summer edition of *The Threshold*! This issue is chock full of informative articles that antitrust merger practitioners will find useful and timely. We continue our “inside baseball” series with pieces by Tracy Fisher of the DOJ Antitrust Division discussing electric power mergers and Lee Van Voorhis, lead defense counsel in *FTC v. Phoebe Putney Health System*, discussing the defense victory in the 11th Circuit and the state action immunity issues now teed up for the Supreme Court, which recently granted cert. Other articles analyze the FTC’s decision to fold its tents in *Express Scripts/Medco*, the current state of play in presenting a successful efficiencies defense in the U.S., and interesting antitrust merger developments in China, Brazil, and at the ICN. We also have helpful summaries of two recent M&A Committee Brown Bag programs and a discussion and compendium of post-

consummation merger challenges by the FTC and DOJ over the last ten years .

The committee has been hard at work this summer, not only on this issue of *The Threshold*, but also on a new edition of the Premerger Notification Practice Manual and two chapters—Joint Ventures and Mergers and Acquisitions—for the 2012 Annual Review of Antitrust Law Developments. The next *Threshold* will be out in early November. We would be delighted to publish letters to the editor commenting on any past articles, and we would be doubly delighted to hear from you about any articles you would like to write yourself.

Enjoy the newsletter!

--Paul B. Hewitt

CLOSING AT YOUR PERIL: POST-CONSUMMATION MERGER CHALLENGES

John D. Harkrider and Rachel J. Adcox¹

A. Introduction

Over the last ten years, the U.S. antitrust agencies have challenged 30 mergers after they have closed. More than 45% of the challenges occurred between 2009 and 2011, suggesting that the Obama administration has been more willing to challenge post-consummation transactions than the Bush Administration. That being said, there is no question that there were quite a few post-consummation challenges in the Bush Administration.

There are many reasons why post-consummation challenges occur with such frequency. The principal reason is that many of the post-consummation deals were small, typically under \$50 million, and therefore not required to file pre-merger notification forms. But larger Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”) reportable transactions are also challenged after they close. This occurs for a number of reasons, including complaints from customers that might not have surfaced prior to the consummation of the transaction, as well as actual evidence of post-consummation price increases or output restrictions.

There are a number of difficulties in restoring competition to the pre-merger state where the eggs have been scrambled. As a result, most mergers challenged after they closed actually survive the challenge, though almost always with some form of remedy. Specifically, only 8 of the 30 post-acquisition

¹ John D. Harkrider is a partner at Axinn, Veltrop & Harkrider, LLP and Rachel J. Adcox is an associate at the firm. Both were counsel to Tyson and George’s in the post-consummation suit of U.S. v. George’s (*see supra* note 4). Dan Oakes also assisted in the research for this article. An earlier version of this article appeared in the Spring 2012 ABA Antitrust Section Spring Meeting course materials. The views expressed herein are the authors’ own and do not represent those of the firm or any of its clients.

challenges resulted in divestitures of all acquired assets and more than 15 resulted in divestitures of only some assets. In addition, 5 post-acquisition challenges resulted in conduct remedies, ranging from arbitration,² to elimination of non-competes,³ to, finally, an agreement to repair a roof and buy a freezer.⁴

In sum, a review of these matters reveals that antitrust risk in a merger does not end when a transaction closes. Clients should be advised that increasing price or restricting output after closing a transaction is likely to increase the risk of antitrust challenge, though the challenge is unlikely to result in losing all the assets that were acquired.

B. Specific Matters

In the following section, we provide a short summary of all post-acquisition challenges over the last 10 years for which there was publicly available data.

1. **In re Cardinal Health, Inc.**
RE acquisition of Biotech Pharmacy, Inc.
 - a. Date Deal Closed
7/31/2009
 - b. Date Deal Challenged
7/21/2011
 - c. Date Resolved/Decided
10/21/2011⁵
 - d. Size of Transaction

² In re Evanston Nw. Healthcare Corp., No. 9315 (F.T.C. 2008) (remedy required Evanston to allow private payors to negotiate separately with Highland Park Hospital; ancillary relief ensured independent negotiations and arbitration of disputes).

³ In re TALX Corp., FTC File No. 0610209 (F.T.C. 2008) (consent order required the elimination of non-compete clauses for employees); In re Lubrizol Corp., No. C-4254 (F.T.C. 2009) (consent order required the elimination of a non-compete provision with Lockhart).

⁴ United States v. George's Foods, LLC, C.A. No. 5:11-cv-00043 (W.D. Va. 2011) (consent decree required George's to make a series of physical improvements to the acquired facility in order to increase production at the plant, thus increasing demand for grower services).

⁵ Date of Final Decision and Order.

Unknown

- e. Reason for Challenge
Acquisition of nuclear pharmacies gave Cardinal Health a monopoly in Albuquerque, New Mexico and large market shares in Las Vegas, Nevada and El Paso, Texas.
- f. Relief Achieved
Cardinal Health required to reconstitute the three nuclear pharmacies it operated in these markets prior to the acquisition, and sell each to an approved buyer with divestiture of intellectual property related to the nuclear pharmacies that Biotech owned before the acquisition.
- g. References
<http://www.ftc.gov/opa/2011/07/cardinalhealth.shtm>
<http://www.ftc.gov/os/caselist/0910136/110721cardinalcmpt.pdf>
<http://www.ftc.gov/opa/2011/10/cardinal.shtm>

2. United States v. George's Foods, LLC

RE acquisition of Tyson Foods, Inc.

- a. Date Deal Closed
5/7/2011
- b. Date Deal Challenged
5/10/2011
- c. Date Resolved/Decided
6/23/2011⁶
- d. Size of Transaction
\$3 million
- e. Reason for Challenge
Deal would reduce number of chicken processors in Virginia's Shenandoah Valley from three to two, reducing demand for grower services and thereby depressing prices paid to growers.
- f. Relief Achieved
Consent decree required George's to make a series of physical improvements to the acquired facility in order to increase production at the plant, thus increasing demand for grower services.
- g. References
<http://www.justice.gov/atr/cases/f270900/270983.pdf>
<http://www.justice.gov/atr/cases/f272400/272495.pdf>

⁶ Date settlement agreed to by parties or court order date.

http://www.antitrustlawyerblog.com/2011/05/doj_challenges_georges_incs_co.html

3. **In re ProMedica Health System, Inc.**

RE acquisition of St. Luke's Hospital

- a. Date Deal Closed
8/31/2010
- b. Date Deal Challenged
1/6/2011
- c. Date Resolved/Decided
12/12/2011⁷
- d. Size of Transaction
\$30 million⁸
- e. Reason for Challenge
ProMedica joinder agreement with St. Luke's would reduce competition and allow ProMedica to raise prices for general acute care and inpatient obstetrical services. Combined entity has 60% of general acute care market and 80% of obstetrical services market.
- f. Relief Achieved
Initial decision ordered divestiture of St. Luke's.
- g. References
<http://www.ftc.gov/os/adjpro/d9346/110106promedicacmpt.pdf>
<http://www.ftc.gov/os/adjpro/d9346/120105promedicadecision.pdf>

4. **In re Lab. Corp. of Am.**

RE acquisition of Westcliff Medical Laboratories, Inc.

- a. Date Deal Closed
6/16/2010⁹
- b. Date Deal Challenged
12/1/2010
- c. Date Resolved/Decided
4/22/2011¹⁰

⁷ Date of initial decision. Matter is currently on appeal.

⁸ ProMedica agreed to maintain St. Luke's name, identity, location and hospital services for a minimum of ten years and agreed to provide St. Luke's \$30 million in capital to fund projects that St. Luke's had deferred because it lacked the funds needed to pay for them.

⁹ APA entered into on 5/17/2010.

¹⁰ The FTC dismissed the complaint and closed the investigation. A statement by Commissioners Jon Leibowitz, William Kovacic and Edith Ramirez concluded, "[w]hile we continue to have

- d. Size of Transaction
\$57.5 million
- e. Reason for Challenge
Acquisition would substantially lessen competition in southern California for the sale of clinical laboratory testing services and to physician groups.
- f. Relief Achieved
After injunction was denied by district court and Ninth Circuit, FTC dismissed the complaint and closed the investigation.
- g. References
<http://www.ftc.gov/os/adjpro/d9345/index.shtm>
<http://www.ftc.gov/opa/2010/12/labcorp.shtm>
<http://www.ftc.gov/os/adjpro/d9345/101201lapcorpcmpt.pdf>
<http://www.ftc.gov/opa/2011/04/labcorp.shtm>

5. In re Tops Markets LLC

RE acquisition of The Penn Traffic Co.

- a. Date Deal Closed
1/29/2010
- b. Date Deal Challenged
8/4/2010
- c. Date Resolved/Decided
8/4/2010
- d. Size of Transaction
\$85 million
- e. Reason for Challenge
Acquisition of bankrupt supermarket chain was anticompetitive in several areas of New York and Pennsylvania and likely would lead to higher grocery prices for consumers because in each market there were no more than three supermarkets within a 10- to 15-mile area.
- f. Relief Achieved
Tops required to divest seven Penn Traffic supermarkets in harmfully affected areas.
- g. References
<http://www.ftc.gov/opa/2010/08/tops.shtm>

reason to believe that LabCorp's acquisition of Westcliff will result in anticompetitive effects, we are convinced that further adjudication of this case will not serve the public interest." Press Release, Fed. Trade Comm'n, FTC Dismisses Complaint in LabCorp (Apr. 22, 2011).

<http://www.ftc.gov/os/caselist/1010074/index.shtm>

<http://www.ftc.gov/os/caselist/1010074/100804topspenncmpt.pdf>

<http://www.ftc.gov/os/caselist/1010074/100804topspenndo.pdf>

6. In re Nufarm Ltd.

RE acquisition of AH Marks Holdings, Ltd.

a. Date Deal Closed

3/4/2008

b. Date Deal Challenged

7/28/2010

c. Date Resolved/Decided

7/28/2010

d. Size of Transaction

Unknown

e. Reason for Challenge

Acquisition created monopolies in the US markets for two herbicides called MCPA and MCPP-P, which are also known as phenoxy herbicides, leaving only two competitors in the market for a third phenoxy herbicide, called 2,4DB.

f. Relief Achieved

Nufarm to divest rights and assets associated with two of the herbicides to competitors and will modify agreements with two other companies to allow them to fully compete in the market for the other herbicide.

g. References

<http://www.ftc.gov/opa/2010/07/nufarm.shtm>

<http://www.ftc.gov/os/caselist/0810130/100728nufarmcmpt.pdf>

<http://www.ftc.gov/os/caselist/0810130/100728nufarmdo.pdf>

7. In re Fid. Nat'l Fin. Inc.

RE acquisition of three subsidiaries of LandAmerica Financial Group, Inc.

a. Date Deal Closed

11/25/2008

b. Date Deal Challenged

7/16/2010

c. Date Resolved/Decided

7/16/2010

d. Size of Transaction

\$258 million

e. Reason for Challenge

Acquisition reduced competition in six geographic areas giving Fidelity a controlling interest in title plants that are either the sole provider of title insurance information services in the region or plants that would possess regional market power.

f. Relief Achieved

Divest ownership in several the joint title plants in the affected markets and divest a copy of the data from each of the title plants to restore the number of independent title plant owners in each county to the number before the acquisition.

g. References

<http://www.ftc.gov/opa/2010/07/fidelity.shtm>

<http://www.ftc.gov/os/caselist/0910032/index.shtm>

<http://www.ftc.gov/os/caselist/0910032/100716fidelitycmpt.pdf>

<http://www.ftc.gov/os/caselist/0910032/100716fidelitydo.pdf>

8. In the Matter of AEA Investors 2006 Fund, LP, et al.

RE acquisition of DA Stuart Holding GmbH

a. Date Deal Closed

7/3/2008

b. Date Deal Challenged

7/14/2010

c. Date Resolved/Decided

7/14/2010

d. Size of Transaction

Unknown

e. Reason for Challenge

Acquisition combined the two largest suppliers of aluminum hot rolling oil in North America used to process aluminum, giving the combined firm control of almost 75% of the North American market.

f. Relief Achieved

Divestiture of some of the hot aluminum rolling oil assets it acquired through the transaction to Quaker Chemical Corp.

g. References

<http://www.ftc.gov/opa/2010/07/houghton.shtm>

<http://www.ftc.gov/os/caselist/0810245/index.shtm>

<http://www.ftc.gov/os/caselist/0810245/100709aeahoughtoncmpt.pdf>

<http://www.ftc.gov/os/caselist/0810245/100709aeahoughtondo.pdf>

9. In re Dun & Bradstreet Corp.

RE acquisition of Quality Education Data

- a. Date Deal Closed
2/11/2009
- b. Date Deal Challenged
5/7/2010
- c. Date Resolved/Decided
9/10/2010
- d. Size of Transaction
\$29 million
- e. Reason for Challenge
As a result of acquiring Quality Education Data, Market Data Retrieval, a company of Dun & Bradstreet, held over 90% of the market share in the K-12 data market, creating a virtual monopoly.
- f. Relief Achieved
Order required divestiture of the QED K-12 Data Business assets and the augmented QED K-12 Database.
- g. References
<http://www.ftc.gov/os/adjpro/d9342/index.shtm>
<http://www.ftc.gov/os/adjpro/d9342/100507dunbradstreetcmpt.pdf>
<http://www.ftc.gov/os/adjpro/d9342/100910dunbradstreetdo.pdf>

10. United States v. Election Sys. & Software, Inc.

RE acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc.

- a. Date Deal Closed
9/2/2009
- b. Date Deal Challenged
3/8/2010
- c. Date Resolved/Decided
3/8/2010
- d. Size of Transaction
\$5 million
- e. Reason for Challenge
ES&S, the largest provider of voting equipment systems, acquired Premier, its next largest competitor.
- f. Relief Achieved
Consent decree required ES&S to divest means to produce all versions of Premier's hardware, software and firmware used to record, tabulate, transmit, or report votes, and grant limited fully-paid-up perpetual license to one of ES&S's systems.
- g. References
<http://www.justice.gov/atr/cases/f256200/256275.htm>
<http://www.justice.gov/atr/cases/f256200/256269.htm>
<http://www.justice.gov/atr/cases/f256200/256273.htm>

11. United States v. Dean Foods Co.

RE acquisition of Consumer Products Division of Foremost Farms USA

- a. Date Deal Closed
4/1/2009
- b. Date Deal Challenged
1/22/2010
- c. Date Resolved/Decided
7/29/2011
- d. Size of Transaction
\$35 million
- e. Reason for Challenge
Dean Foods' acquisition of two Foremost dairy processing plants eliminated a key rival and resulted in 57% market share in Wisconsin, northeast Illinois, and the Upper Peninsula of Michigan.
- f. Relief Achieved
Dean Foods was directed to divest the Waukesha Plant and all related tangible and intangible assets; additional ancillary remedies.
- g. References
http://www.justice.gov/atr/public/press_releases/2010/254435.htm
<http://www.justice.gov/atr/cases/deanfoods.htm>
<http://www.justice.gov/atr/cases/f273400/273469.pdf>
<http://www.justice.gov/atr/cases/f254400/254455.htm>

12. United States v. Cameron Int'l Corp.

*RE proposed acquisition of NATCO Group, Inc.*¹¹

- a. Date Deal Closed
11/18/2009¹²
- b. Date Deal Challenged
11/17/2009
- c. Date Resolved/Decided
11/17/2009
- d. Size of Transaction
\$780 million
- e. Reason for Challenge

¹¹ Assets to be divested prior to the consummation of the proposed transaction were acquired in a previous transaction reportedly valued below minimum HSR Act reporting threshold.

¹² Intended closing date.

Acquisition would substantially lessen competition in the development, production and sale of refinery desalters in the US.

f. Relief Achieved

Required divestiture of refinery desalter assets purchased in 2005 in order to proceed with pending acquisition. Also required non-exclusive license to certain affected technology.

g. References

http://www.justice.gov/atr/public/press_releases/2009/252077.htm

<http://www.justice.gov/atr/cases/cameron.htm>

<http://www.justice.gov/atr/cases/f252000/252078.htm>

<http://www.justice.gov/atr/cases/f252000/252080.htm>

<http://www.bizjournals.com/houston/stories/2009/06/01/daily16.html>

13. In re Carilion Clinic

*RE acquisition of Odyssey IV, LLC and Center for Surgical Excellence, LLC*¹³

a. Date Deal Closed

8/22/2008

b. Date Deal Challenged

7/23/2009

c. Date Resolved/Decided

11/23/2009

d. Size of Transaction

\$20 million

e. Reason for Challenge

Carilion acquired two competing outpatient clinics in the Roanoke, Virginia area. Alleged that, for certain procedures, out-of-pocket costs for many patients in local geographic market could increase by 900%.

f. Relief Achieved

Consent order requiring divestiture of the two outpatient clinics within three months.

g. References

www2.ftc.gov/opa/2009/07/carilion.shtm

www2.ftc.gov/os/adipro/d9338/index.shtm

<http://www.ftc.gov/os/adjpro/d9338/090724carilioncmpt.pdf>

<http://www.ftc.gov/os/adjpro/d9338/091201carilliondo.pdf>

¹³ The challenging agency did not specifically indicate that this transaction was non-reportable, but the reported transaction value was below the minimum HSR reporting threshold.

14. **In re Lubrizol Corp.**
*RE acquisition of Lockhart Co.*¹⁴
- a. Date Deal Closed
2/7/2007
 - b. Date Deal Challenged
2/26/2009
 - c. Date Resolved/Decided
4/7/2009
 - d. Size of Transaction
\$15.6 million
 - e. Reason for Challenge
Lubrizol acquired product line of a chemical additive (oxidate) used to make rust preventers from Lubrizol, thus combining top two providers in a highly concentrated market.
 - f. Relief Achieved
Consent order requiring transfer of oxidate assets to another company and elimination of a non-compete provision with Lockhart.
 - g. References
<http://www.ftc.gov/opa/2009/02/lubrizol.shtm>
www2.ftc.gov/os/caselist/0710230/index.shtm
www2.ftc.gov/os/caselist/0710230/090226lubrizolcmpt.pdf
15. **United States v. Microsemi Corp.**
RE acquisition of Semicoa, Inc.
- a. Date Deal Closed
7/14/2008
 - b. Date Deal Challenged
12/18/2008
 - c. Date Resolved/Decided
8/20/2009
 - d. Size of Transaction
\$25 million
 - e. Reason for Challenge
Acquisition violated § 2 of the Sherman Act by creating monopoly in small signal transistors suitable for certain aerospace and military applications; violated § 7 of the Clayton Act by reducing

¹⁴ The challenging agency did not specifically indicate that this transaction was non-reportable, but the reported transaction value was below the minimum HSR reporting threshold.

from three to two competitors for specialized semiconductors for such applications.

- f. Relief Achieved
Settlement requiring divestiture of the Semicoa assets.
- g. References
http://www.justice.gov/atr/public/press_releases/2009/249246.htm
<http://www.justice.gov/atr/cases/microsemi.htm>
<http://www.justice.gov/atr/cases/f240500/240537.htm>
<http://www.justice.gov/atr/cases/f249200/249244.htm>
<http://investor.microsemi.com/releasedetail.cfm?releaseid=322232>

16. FTC v. Ovation Pharm., Inc.

RE acquisition of NeoProfen

- a. Date Deal Closed
1/18/2006¹⁵
- b. Date Deal Challenged
12/16/2008
- c. Date Resolved/Decided
11/22/2011¹⁶
- d. Size of Transaction
\$32.5 million¹⁷
- e. Reason for Challenge
Acquisition of only competing treatment for premature infants' heart condition violated § 7 of the Clayton Act; accompanying price increase violated § 2 of the FTC Act.
- f. Relief Achieved
None; drugs found not to be in same market. D. Minn. dismissed, dismissal upheld by 8th Circuit panel, rehearing en banc denied.
- g. References
www2.ftc.gov/opa/2008/12/ovation.shtm
www2.ftc.gov/os/caselist/0810156/index.shtm
<http://www.ftc.gov/os/caselist/0810156/081216ovationcmpt.pdf>
<http://www.ftc.gov/os/caselist/0810156/110919lundbeckfindings.pdf>

¹⁵ Date of APA with Abbott Laboratories that gave Ovation contingent US rights to NeoProfen.

¹⁶ Date rehearing denied.

¹⁷ Pursuant to the APA, Ovation agreed to pay Abbott \$2.5 million at closing, \$15 million upon approval of the NDA, annual milestone payments totaling \$15 million for 2007 and 2008, and, provided sales reached certain thresholds, a royalty of 7%.

<http://www.ftc.gov/os/caselist/0810156/110919lundbeckopinion.pdf>
www4.gtlaw.com/marketing/LIT/13212/newsletter.htm#Article1
FTC v. Ovation Pharmaceuticals, Inc., Civ. 08-6379 (D. Minn. 2009)

17. **In re Polypore Int'l, Inc.**

RE acquisition of Microporous Holding Corp.

- a. Date Deal Closed
2/29/2008
- b. Date Deal Challenged
9/10/2008
- c. Date Resolved/Decided
7/11/2012¹⁸
- d. Size of Transaction
\$76 million
- e. Reason for Challenge
Anticompetitive effects and/or attempted monopolization in the market for (1) all polyethylene battery separators, or (2) four types of flooded lead-acid battery separators.
- f. Relief Achieved
ALJ initial decision required complete divestiture of Microporous and invalidation of a joint marketing agreement that blocked a potential entrant from the market. Polypore appealed to the Commission, which affirmed the decision for all markets except UPS batteries and issued a modified divestiture order. Polypore then appealed to the Court of Appeals for the 11th Circuit, which affirmed the Commission's decision.
- g. References
www2.ftc.gov/opa/2008/09/polypore.shtm
www2.ftc.gov/os/adipro/d9327/index.shtm
<http://www.ftc.gov/opa/2010/03/polypore.shtm>
<http://www.ftc.gov/os/adjpro/d9327/091008cmp9327.pdf>
<http://www.ftc.gov/opa/2011/03/polypore.shtm>

18. **United States v. Raycom Media, Inc.**

RE acquisition of WWBT-TV from Lincoln Financial Media Co.

- a. Date Deal Closed

¹⁸ Date of Eleventh Circuit decision. Initial decision was on 3/8/2010. Decision of the Commission was on 12/13/10.

- 4/1/2008
- b. Date Deal Challenged
8/28/2008
 - c. Date Resolved/Decided
12/4/2008
 - d. Size of Transaction
Unknown
 - e. Reason for Challenge
Acquisition consolidated ownership of two of the top four broadcast television stations in Richmond, Virginia with more than 50% of total broadcast television spot advertising revenue in the Richmond DMA, eliminating competition.
 - f. Relief Achieved
Divestiture of one of two stations owned in Richmond market, WTVR-TV, though not station acquired in transaction.
 - g. References
http://www.justice.gov/atr/public/press_releases/2008/236611.htm
<http://www.justice.gov/atr/cases/raycom.htm>

19. In re TALX Corp.

*RE acquisition of Six Competitors*¹⁹

- a. Date Deal Closed
3/27/2002 through 11/1/2005
- b. Date Deal Challenged
4/28/2008
- c. Date Resolved/Decided
8/6/2008
- d. Size of Transaction
\$230.5 million²⁰
- e. Reason for Challenge
Acquisitions eliminated competition in the markets for outsourced unemployment compensation management services and employment verification services.
- f. Relief Achieved
Consent decree eliminated non-compete clauses for employees, allowed customers to terminate long-term contracts (up to a total of

¹⁹ The challenging agency did not specifically indicate that all of these transactions were non-reportable, but some of the reported transaction values were below the minimum HSR reporting threshold.

²⁰ Represents the sum of a series of transactions of \$125 million (two acquisitions), \$1.5 million, \$39 million, \$9 million, \$24 million and \$32 million.

\$10 million), prohibited agreements requiring ADP to subcontract to TALX services agreements with new customers.

g. References

www2.ftc.gov/opa/2008/04/talx.shtm

www2.ftc.gov/os/caselist/0610209/index.shtm

<http://www.ftc.gov/os/caselist/0610209/080428complaint.pdf>

<http://www.ftc.gov/os/caselist/0610209/080808decision.pdf>

20. United States v. Daily Gazette Co.

RE combination of The Charleston Gazette and Charleston Daily Mail

a. Date Deal Closed

5/7/2004

b. Date Deal Challenged

5/22/2007

c. Date Resolved/Decided

7/19/2010

d. Size of Transaction

\$55 million

e. Reason for Challenge

Gave Charleston Gazette control over and ability to shut down Charleston Daily Mail, leading to monopoly in Charleston, West Virginia local daily newspaper market.

f. Relief Achieved

Consent decree required entry into amended partnership and operating agreements and required continued publication of the Charleston Daily Mail unless it is determined to be a failing firm and has received prior written approval of the US.

g. References

http://www.justice.gov/atr/public/press_releases/2007/223466.htm

<http://www.justice.gov/atr/cases/daily.htm>

<http://www.justice.gov/atr/cases/f223400/223469.htm>

<http://www.justice.gov/atr/cases/f259100/259101.htm>

<http://www.justice.gov/atr/cases/f260600/260682.htm>

21. United States v. Amsted Indus., Inc.

RE acquisition of FM Industries

a. Date Deal Closed

12/1/2005

b. Date Deal Challenged

4/18/2007

c. Date Resolved/Decided

4/18/2007

- d. Size of Transaction
Unknown
- e. Reason for Challenge
Achieved monopoly in market for new end-of-car cushioning units, 80% share of market for reconditioned end-of-car cushioning units.
- f. Relief Achieved
Consent decree required divestiture, without compensation, all acquired intangible assets and grant a perpetual royalty-free license to all Amsted IP.
- g. References
http://www.justice.gov/atr/public/press_releases/2007/222737.htm
<http://www.justice.gov/atr/cases/amsted.htm>
<http://www.justice.gov/atr/cases/f222700/222731.htm>
<http://www.justice.gov/atr/cases/f222700/222736.htm>

22. In re Dan L. Duncan

RE EPCO, Inc. and Enterprise Products Partners LP acquired controlling interest in Texas Eastern Products Pipeline Company, LLC and TEPPCO Partners, LP

- a. Date Deal Closed
2/24/2005
- b. Date Deal Challenged
8/18/2006
- c. Date Resolved/Decided
10/31/2006
- d. Size of Transaction
\$1.2 billion²¹
- e. Reason for Challenge
Combined the two largest providers of salt dome storage for Natural Gas Liquids in Mont Belvieu, Texas (connected to the Dixie Pipeline supplying the Southeastern United States).
- f. Relief Achieved
Divest interest in TEPPCO-owned NGL Storage Facility and related pipeline and land assets; ancillary relief.
- g. References
<http://www.ftc.gov/opa/2006/08/teppco.shtm>
<http://www.ftc.gov/os/caselist/0510108/0510108.shtm>

²¹ Under the agreement, EPCO, Inc. acquired TEPPCO's general partner, Texas Eastern Products Pipeline Company, LLC for \$1.1 billion, and 2.5 million limited partnership units of TEPPCO Partners, LP for \$100 million from Duke Energy Field Services, LLC.

<http://www.ftc.gov/os/caselist/0510108/complaint.pdf>
<http://www.ftc.gov/opa/2006/11/fyi0670.shtm>
<http://www.ftc.gov/os/caselist/0510108/0510108c4173do061103.pdf>

23. In re Hologic, Inc.

*RE acquisition of Fischer Imaging Corp.*²²

- a. Date Deal Closed
9/29/2005
- b. Date Deal Challenged
7/7/2006
- c. Date Resolved/Decided
8/9/2006
- d. Size of Transaction
\$32 million
- e. Reason for Challenge
Eliminated only significant rival in market for Prone Stereotactic Breast Biopsy Systems.
- f. Relief Achieved
Divest all acquired assets to a pre-approved acquirer; ancillary relief.
- g. References
<http://www.ftc.gov/opa/2006/07/hologic.shtm>
<http://www.ftc.gov/os/caselist/0510263/0510263.shtm>
<http://www.ftc.gov/os/caselist/0510263/0510263complaint.pdf>
<http://www.ftc.gov/os/caselist/0510263/0510263do.pdf>

24. In re Evanston Nw. Healthcare Corp.

*RE merger with Highland Park Hospital*²³

- a. Date Deal Closed
1/1/2000
- b. Date Deal Challenged
2/10/2004
- c. Date Resolved/Decided
4/28/2008²⁴
- d. Size of Transaction
\$200 million

²² The transaction was not reportable under HSR for being valued at less than the filing threshold.

²³ Reported under HSR.

²⁴ Date remedy finalized. The ALJ decision was on 10/20/2005 and the Commission affirmed the change in remedy on 8/6/2007.

- e. Reason for Challenge
Acquisition of hospital and affiliated physician association allowed Evanston to raise prices at all three area hospitals for hospital services and physician services.
- f. Relief Achieved
ALJ ordered divestiture of Highland Park Hospital. Commission later rejected divestiture and ordered a conduct remedy requiring Evanston to allow private payors to negotiate separately with Highland Park Hospital; ancillary relief ensured independent negotiation and arbitration of disputes.
- g. References
<http://www.ftc.gov/os/adjpro/d9315/index.shtm>
<http://www.ftc.gov/opa/2004/02/enh.shtm>
<http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf>
<http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>
<http://www.ftc.gov/opa/2008/04/evanston.shtm>
<http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf>

25. In re Aspen Tech., Inc.

RE acquisition of Hyprotech

- a. Date Deal Closed
5/31/2002
- b. Date Deal Challenged
8/6/2003
- c. Date Resolved/Decided
7/15/2004²⁵
- d. Size of Transaction
\$106.1 million
- e. Reason for Challenge
Combined the two most significant and closest competitors in continuous process engineering simulation software, batch process engineering software for process industries.
- f. Relief Achieved
Divest integrated engineering software business to Bentley Systems; divest batch and continuous process software to a Commission-approved buyer; ancillary relief. Additional requirements imposed in 2009 expanding obligations to remediate due to Aspen's failure to comply with original decree.
- g. References

²⁵ Consent order modified on 7/6/2009.

<http://www.ftc.gov/opa/2003/08/aspens.htm>
<http://www.ftc.gov/os/adjpro/d9310/index.shtm>
<http://www.ftc.gov/os/adjpro/d9310/030806admincomplaint.pdf>
<http://www.ftc.gov/os/adjpro/d9310/040715do.pdf>
<http://www.ftc.gov/opa/2004/12/fyi0472.shtm>
<http://www.ftc.gov/os/adjpro/d9310/090706aspentechorder.pdf>

26. **United States v. Dairy Farmers of Am., Inc.**
RE acquisition of Southern Belle Dairy Co., LLC
- a. Date Deal Closed
February 2002
 - b. Date Deal Challenged
4/24/2003
 - c. Date Resolved/Decided
3/23/2007²⁶
 - d. Size of Transaction
\$19 million
 - e. Reason for Challenge
Substantially lessened competition for sale of milk sold to schools in 100 school districts in eastern Kentucky and Tennessee.
 - f. Relief Achieved
Consent decree required divestiture all interests in acquired company to suitable buyer; ancillary relief (including best efforts to force joint venture partner to divest interests).
 - g. References
<http://www.justice.gov/atr/cases/dairy0.htm>
<http://www.justice.gov/atr/cases/f200900/200972.htm>
<http://www.justice.gov/atr/cases/f221700/221735.htm>
<http://www.justice.gov/atr/cases/f221700/221735.htm>
27. **In re Airgas, Inc.**
*RE acquisition of Puritan Bennett Medical Gas Business from Mallinckrodt, Inc.*²⁷
- a. Date Deal Closed
1/21/2000
 - b. Date Deal Challenged
10/26/2001
 - c. Date Resolved/Decided

²⁶ Date of final judgment.

²⁷ Reported under HSR.

10/26/2001

- d. Size of Transaction
\$90 million
- e. Reason for Challenge
Achieved monopoly power in the production and sale of nitrous oxide.
- f. Relief Achieved
Divest two nitrous oxide plants, customer contracts, bulk nitrous oxide, and related assets to achieve competition.
- g. References
<http://www.ftc.gov/opa/2001/10/airgas.shtm>
<http://www.ftc.gov/os/2001/10/airgascmp.htm>
<http://www.ftc.gov/os/2001/10/airgasdo.htm>

28. In re Chi. Bridge & Iron Co.

*RE acquisition of Pitt-Des Moines, Inc.*²⁸

- a. Date Deal Closed
2/7/2001
- b. Date Deal Challenged
10/25/2001
- c. Date Resolved/Decided
1/25/2008²⁹
- d. Size of Transaction
\$84 million
- e. Reason for Challenge
Anticompetitive effects in markets for LNG, LPG and LIN/LOX/LAR field-erected specialty industrial storage tanks, and LNG plants and import terminals in the US.
- f. Relief Achieved
CB&I required to create two separate, stand-alone divisions capable of competing in four relevant markets, and divest one of those divisions to restore competition as it existed prior to acquisition; additional ancillary relief.
- g. References
<http://www.ftc.gov/os/adjpro/d9300/index.shtm>
<http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm>
<http://www.ftc.gov/opa/2001/10/chicagobridge.shtm>
<http://www.ftc.gov/os/2003/06/cbiid.pdf>

²⁸ Reported under HSR.

²⁹ The FTC order of divestiture on 6/18/2003 was later upheld on 1/6/2005 and again on 1/25/2008 by the Fifth Circuit.

29. In re MSC Software Corp.

RE acquisitions of Universal Analytics, Inc. and Computerized Structural Analysis & Research Corp.

- a. Date Deal Closed
6/24/1999 (UAI)
11/4/1999 (CSAR)
- b. Date Deal Challenged
10/10/2001
- c. Date Resolved/Decided
8/14/2002
- d. Size of Transaction
\$18.4 million³⁰
- e. Reason for Challenge
Achieved monopoly power in software for engineering analysis, “finite element analysis,” and Nastran software.
- f. Relief Achieved
Divest at least one clone copy of Nastran software, including the source code for royalty-free, perpetual, non-exclusive licenses to one or two approved acquirers for sale of software. Customers allowed to terminate licenses entered into since the acquisitions with refund to customers.
- g. References
<http://www.ftc.gov/opa/2001/10/msc.shtm>
www2.ftc.gov/os/caselist/d9299.shtm
<http://www.ftc.gov/os/2001/10/msccmp.htm>
www2.ftc.gov/os/2002/08/mscsoftwareagee.pdf
<http://www.ftc.gov/opa/2002/08/mscsoftware.shtm>

30. FTC v. Hearst Trust

*RE acquisition of Medi-Span, Inc.*³¹

- a. Date Deal Closed
1/15/1998
- b. Date Deal Challenged
4/5/2001
- c. Date Resolved/Decided
11/20/2011
- d. Size of Transaction
\$38 million

³⁰ MSC acquired UAI for approximately \$8.4 million and acquired CSAR for approximately \$10 million.

³¹ Reported under HSR.

- e. Reason for Challenge
Achieved monopoly power in integratable drug data files.
- f. Relief Achieved
Create and divest competing business consisting of all acquired assets and other assets necessary to compete; disgorgement of \$19 million in profits.
- g. References
<http://www.justice.gov/atr/cases/indx330.htm>
<http://www.justice.gov/atr/cases/f9200/9288.htm>
<http://www.ftc.gov/opa/2001/11/hearst.shtm>
<http://www.ftc.gov/os/2001/11/hearstorder.pdf>
<http://www.ftc.gov/os/2001/10/hearstcmp.pdf>

About The Threshold

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