Paul, Weiss

Client Memorandum

November 13, 2025

FTC Loses Challenge to GTCR's Acquisition of Surmodics

- The parties' post-complaint divestiture plan—bolstered by credible testimony from businesspeople and an expert economist on market definition and market share—allowed the parties to rebut the presumption that the likely effect of GTCR's acquisition of Surmodics would be substantially to lessen competition in the relevant market for hydrophilic coatings for medical devices.
- The court agreed with the deal parties that the relevant market likely includes device manufacturers' self-supply of hydrophilic coatings in addition to outsourced supply. The court also agreed that, in this case, a company's market share is better measured by its share of new opportunities won, rather than its share of sales made in the past.
- When the divestiture is evaluated in light of these adjustments, the deal no longer exceeds the market concentration thresholds that trigger a presumption of illegality. In the absence of other credible evidence of competitive harm, the court allowed the modified deal to proceed.

At a telephonic hearing held on November 11, 2025, Judge Jeffrey I. Cummings of the United States District Court for the Northern District of Illinois denied the Federal Trade Commission's request to preliminarily enjoin GTCR, a private equity firm, from acquiring Surmodics pending the outcome of an FTC administrative proceeding. In denying the FTC's request, the court relied heavily on a divestiture agreement proposed by the parties, and on testimony from businesspeople and a "credible and informative" defense expert.

The FTC's Complaint

In its complaint, the FTC alleged that the effect of GTCR's proposed acquisition of Surmodics may be substantially to lessen competition in the market for "outsourced hydrophilic coatings in the United States." These coatings are applied to various medical devices to reduce friction. According to the FTC, GTCR is already the majority owner of Biocoat, the "second-largest provider of hydrophilic coatings in the United States." The common ownership of both would, according to the FTC: result in GTCR controlling over 50% of the relevant market; increase concentration in an already highly concentrated market to a level well beyond the threshold at which the U.S. antitrust agencies presume a transaction violates the law; and eliminate existing head-to-head competition between the parties. This, in turn, would lead to increased prices and decreased innovation.

The Court's Evaluation of the Evidence

Market Definition. The court found several flaws with the evidence offered by the FTC. According to the court, the FTC improperly excluded from the relevant market the "in-house" self-supply of hydrophilic coatings by medical device manufacturers. Inclusion of these figures lowered the deal parties' shares.

Market Shares. Moreover, the court found fault with the FTC's use of 2024 "legacy" revenue figures to calculate market shares. Judge Cummings, citing the defendants' expert, explained that this industry is "unique in terms of how much revenue is legacy revenue and how long it lasts. For example, Biocoat's contracts are 15-year contracts that automatically renew." Therefore, 2024 revenue "isn't informative about the competitiveness of the market because the market share is biased by legacy revenue" which is "is revenue derived from the old device opportunities won and lost in the past."

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Instead, the court looked at "new opportunities won" by the companies to supply coatings for devices approved by the Food and Drug Administration in 2024. Of these, the two companies' combined share was less than 30% and therefore below the threshold at which the FTC-DOJ merger guidelines presume that a substantial lessening of competition is likely.

Head-to-Head Competition. Finally, the court questioned the FTC's argument that the transaction would result in the loss of significant head-to-head competition between the parties. To the contrary, the court cited testimony from businesspeople that they typically did not know who their competitors are on any given sales pitch and testimony from the parties' expert that the companies had actually competed head to head on only 0.4% of opportunities over the past five years.

Divestiture. After the FTC challenged the transaction, the parties proposed to divest part of Biocoat's hydrophilic coatings business to Integer, a contract development and manufacturing organization with 40 years' experience in manufacturing a different type of coating. The addition of the Biocoat assets, according to the court, "will allow Integer to serve as a one stop shop for the manufacturing and application of hydrophilic coatings," bolstering its competitiveness.

The court found that the proposed divestiture "sufficiently mitigates the merger's effect, such that it is no longer likely to substantially lessen competition." Here, too, the quality of the evidence appears to have been determinative. On the one hand, the FTC's expert, who had never testified about a divestiture and whose "expertise . . . really doesn't extend in this particular area," engaged in "speculation" that Biocoat would not perform under the transition services agreement. On the other hand, "Biocoat's personnel have testified that they intend to perform" the agreement and an executive of the divestiture purchaser testified that he "fully expects that the Transition Services Agreement will be performed."

Significance

Many merger cases turn on the quality and credibility of the real-world evidence before the court, and this case is no different. This case is also in line with many other merger cases in that the outcome largely turned on how the court defined the relevant market.

More significantly, this is another in a developing series of cases in which deal parties have prevailed against government challenges by proposing and successfully "litigating the fix." This generally involves the parties proposing a fix after their merger is challenged and litigating the as-amended deal. By contrast, the agencies have maintained that any "fix" proposed by the parties should be evaluated only at the remedies stage *after* liability has been determined. Courts, however, have been reluctant to ignore the effect of the fix on liability.

Consideration of the fix in the liability phase is advantageous for the deal parties. Under the relevant analytical framework, as the court here explained, "defendants are only required to show that the proposed divestiture sufficiently mitigate[s] the merger's effect, such that it was no longer likely to substantially lessen competition. The defendants are not required to show that the divestiture would negate the anti-competitive effects of the merger entirely," as would be the case for a remedy.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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