December 23, 2019

Antitrust Month in Review – November 2019

In November, there were several significant developments at the U.S. federal antitrust enforcement agencies. The Federal Trade Commission (FTC) accepted a proposed settlement which requires the largest divestiture it or the U.S. Department of Justice (DOJ) has ever required to resolve competitive concerns in a merger matter. The DOJ, in addition to requiring divestitures in a bank merger, filed a motion to terminate the so-called Paramount Decrees, which have governed motion picture distribution for over seventy years. The DOJ also announced the formation of a Procurement Collusion Strike Force to investigate and prosecute collusion among companies involved in government procurement.

We discuss these and other developments below.

US – DOJ/FTC Merger

DOJ Requires Divestitures in BB&T Corp. and SunTrust Banks Inc. Merger

On November 8, the DOJ announced that BB&T Corp. and SunTrust Banks Inc. "have agreed to divest 28 branches across North Carolina, Virginia, and Georgia with approximately $2.3 billion in deposits to resolve antitrust concerns arising from BB&T's proposed merger with SunTrust." According to the DOJ, this "divestiture constitutes the largest divestiture in a bank merger in over a decade." Because this merger is "subject to the final approval of the Board of Governors of the Federal Reserve System, as well as the Federal Deposit Insurance Corporation (FDIC) . . . the Justice Department will advise the Federal Reserve Board and the FDIC that it will not challenge the merger, provided that (1) the parties divest the branch offices and entire customer relationships (i.e., all deposits and loans) associated with the divestiture branches; (2) the parties commit to the Federal Reserve Board that they will comply with the agreement with the Department; and (3) the parties' commitments to the Department are included as a condition to any order the Federal Reserve Board enters approving the transaction." The DOJ has not filed a complaint and proposed final judgment in federal court and therefore this settlement is not subject to Tunney Act review by a federal district judge. Press Release, U.S. Dept. of Justice, Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019).

FTC Accepts Proposed Settlement Requiring Divestiture in Bristol-Myers Squibb's Acquisition of Celgene

On November 15, the FTC announced that it has accepted a proposed settlement to resolve the Commission's concerns that Bristol-Myers Squibb's (BMS) "proposed $74 billion acquisition of Celgene would violate federal antitrust law." The firms "agreed to divest Celgene's Otezla" – a drug used in the treatment of moderate-to-severe psoriasis – to Amgen. According to the FTC, "[t]he proposed divestiture

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[valued at $13.4 billion] is the largest that the FTC or the U.S. Department of Justice has ever required in a merger enforcement matter." According to the FTC, "BMS has a pipeline product under development that is considered the most advanced oral treatment for moderate-to-severe psoriasis," and this "product will likely be the next entrant into the market and would compete directly with Otezla." As such, the FTC alleged that the acquisition would "eliminate[e] future competition between BMS and Celgene in developing, manufacturing and selling oral products to treat moderate-to-severe psoriasis in the United States" and that "entry into this market would not be timely, likely, or sufficient to deter the anticompetitive effects of the acquisition" due to the time it would take to develop and secure regulatory approval for new drugs.

Commissioners Rohit Chopra and Rebecca Kelly Slaughter voted against accepting the proposed settlement. They expressed concerns about the sufficiency of the FTC's historical approach to examining pharmaceutical mergers, which Commissioner Slaughter described as "identif[ying] specific product overlaps between the merging parties, including of drugs in development, and requiring divestitures of one of those products." Press Release, Fed. Trade Comm'n, FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition (Nov. 15, 2019); Dissenting Stmt. of Comm'r Rebecca Kelly Slaughter, In the Matter of Bristol-Myers Squibb & Celgene, FTC File No. 191-0061 (Nov. 15, 2019).

US – DOJ Civil Non-Merger

DOJ Seeks to Terminate Paramount Consent Decrees

On November 22, the DOJ announced that after "a thorough review, including a 60-day public comment period," it filed "a motion to terminate the Paramount Consent Decrees, which for over 70 years have regulated how certain movie studios distribute films to movie theatres." According to the DOJ, the Paramount "decrees required the movie studios to separate their distribution operations from their exhibition businesses. They also banned various motion picture distribution practices, including block booking (bundling multiple films into one theatre license), circuit dealing (entering into one license that covered all theatres in a theatre circuit), resale price maintenance (setting minimum prices on movie tickets), and granting overbroad clearances (exclusive film licenses for specific geographic areas)." In seeking to terminate the decrees, the DOJ observed that "[n]ew technology has created many different movie platforms that did not exist when the decrees were entered into, including cable and broadcast television, DVDs, and the Internet through movie streaming and download services." Press Release, U.S. Dep't of Justice, Department of Justice Files Motion to Terminate Paramount Consent Decrees (Nov. 22, 2019).

US – Agency News

DOJ Announces Procurement Collusion Strike Force

On November 5, the DOJ announced that it – along with the FBI, the Department of Defense (DOD), the United States Postal Service (USPS) and the General Services Administration (GSA) – is forming a new government Procurement Collusion Strike Force. The strike force will focus "on deterring, detecting, investigating and prosecuting" collusion among companies and individuals involved in government procurement at all levels. Within the DOJ, the strike force will involve prosecutors from the Antitrust Division and thirteen United States Attorney's offices from around the country, including Chicago, Dallas, New York, Los Angeles, Miami, Sacramento and Washington, D.C. In addition to involvement by the Offices of Inspector General (OIG) of the DOD, USPS and GSA, the task force will also partner with other federal agency OIGs. At the announcement of the task force, the head of the DOJ's Antitrust Division noted that "today, more than one third of the Antitrust Division's 100-plus open investigations relate to public procurement or otherwise involve the government being victimized by criminal conduct." Press Release, U.S. Dep't of Justice, Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (Nov. 5, 2019); Paul, Weiss Client Memo., DOJ Announces Government Procurement Collusion Strike Force (Nov. 5, 2019).

US – Private Litigation

Court Grants Motion to Dismiss Antitrust Claims Against Radiology Certification Board

On November 19, Judge Jorge L. Alonso of the United States District Court for the Northern District of Illinois granted the American Board of Radiology's (ABR) motion to dismiss a complaint alleging, among other things, that the Board illegally tied initial certification for radiologists to later "maintenance of certification" thereby "forcing radiologists to purchase [maintenance of certification] to their detriment and the detriment of [the Board's] would-be competitors." In granting the motion to dismiss, the court found that maintenance of certification was not a separate product from initial certification and therefore the plaintiffs could not maintain a tying claim, which requires two separate products. The court wrote that "plaintiff attempts to isolate components of what is essentially a business method—in this case, for assessing whether a physician has 'acquired the requisite standard of knowledge, skill, and understanding essential' in her particular specialty or subspecialty—and declare them to be a tie-in. But what ABR sells to its certified physicians . . . is essentially an endorsement based on a 'formula, including all that it entails' . . . for assessing physicians' knowledge, skill, and understanding," and that "adding a new component to the product that will cause customers to incur ongoing costs does not make the component a new product." The court also dismissed a monopolization claim. Siva v. Am. Bd. of Radiology, No. 19-cv-1407 (N.D. Ill. Nov. 19, 2019).

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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:

Justin Anderson
+1-202-223-7321
janderson@paulweiss.com

Robert A. Atkins
+1-212-373-3183
ratkins@paulweiss.com

Craig A. Benson
+1-202-223-7343
cbenson@paulweiss.com

Joseph J. Bial
+1-202-223-7318
jbial@paulweiss.com

Andrew J. Forman
+1-202-223-7319
aforman@paulweiss.com

Kenneth A. Gallo
+1-202-223-7356
kgallo@paulweiss.com

Jonathan S. Kanter
+1-202-223-7317
jkanter@paulweiss.com

William B. Michael
+1-212-373-3648
wmichael@paulweiss.com

Jane B. O'Brien
+1-202-223-7327
jobrien@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056
jrubin@paulweiss.com

Charles F. "Rick" Rule
+1-202-223-7320
rrule@paulweiss.com

Aidan Synnott
+1-212-373-3213
asynnott@paulweiss.com

Daniel J. Howley
+1-202-223-7372
dhowley@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this client alert.