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When Is Antitrust Merger Review Over?

By **Peter Jonathan Halasz and Gregory L. Kinzelman, Schulte Roth & Zabel**
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On Dec. 3, 2018, Judge Richard Leon of the U.S. District Court for the District of Columbia said that he is considering whether CVS Health Corp. and Aetna Inc. should be ordered to keep their operations separate until he can determine whether the settlement the parties reached with the U.S. Department of Justice Antitrust Division satisfies the required legal standard of review under the Tunney Act.[1] Judge Leon ordered the parties to submit arguments addressing this issue by Dec. 14, 2018, and set another hearing for Dec. 18, 2018. Such a move is highly unusual, given such merger settlements are ordinarily approved without a hearing.

This comes at the end of a year with other notable instances in which parties have had to continue to defend their mergers long after the expiration of the Hart-Scott-Rodino Act process, even after closing. On Dec. 18, 2017, the DOJ required Parker-Hannifin to divest certain assets that it had acquired in its Feb. 28, 2017, acquisition of Clarcor Inc., despite the fact that the DOJ had earlier reviewed the merger and allowed the HSR waiting period to expire on Jan. 17, 2017.[2] And in October this year, a judge in the Eastern District of Virginia found divestiture to be an appropriate remedy for an anti-competitive merger challenged in a private antitrust action.[3] In that case, Steves Brothers alleged that Jeld-Wen Holding Inc.'s 2012 acquisition of CraftMaster Manufacturing Inc. violated the Clayton Act, even though the DOJ cleared the merger under HSR in 2012 and, again, in 2015 after a further investigation initiated at the request of Steves. (A final decision on remedies remains pending in this case.)

Background

CVS, Aetna and the DOJ agreed in October to resolve the DOJ's concerns regarding potential anti-competitive aspects of the merger by requiring CVS and Aetna to divest an overlap between their Medicare Part D plans as a condition to approval under the HSR Act. To comply with that requirement, Aetna sold its Medicare Part D business to WellCare Health Plans. CVS and Aetna closed their $70 billion deal on Nov. 28, 2018.

When merging parties settle the DOJ's antitrust concerns with a consent agreement, under the Tunney Act, a federal judge must approve the settlement based on factors enumerated in the act. This step has become somewhat of a formality, with judges rarely questioning the settlement terms or holding hearings. Companies are not required to, and typically don't, wait for final judicial approval before closing their transactions.

Tunney Act Background

The Tunney Act, officially known as the Antitrust Procedures and Penalties Act, imposes specific rules for the notification of DOJ merger settlement consent agreements, provides a 60-day period for third parties to provide comments, and requires judicial review of the terms of the consent to determine if it is in the "public interest."

Prior to the Tunney Act's passage in 1974, there were no judicial procedures governing the DOJ's entering into of antitrust consent decrees. The act was passed in part as a response to the DOJ's controversial settlement of antitrust merger challenges involving International Telephone & Telegraph Corp. during the Nixon administration. The ITT merger settlements prompted allegations that the DOJ was improperly influenced by ITT because they imposed significantly less restrictive relief than initially sought and were contemporaneous with significant political contributions to the president's political party.

Judicial Review of a DOJ Merger Consent Is Limited Under the Tunney Act

Under the Tunney Act, judges are tasked with ensuring that the merger settlement is in the public interest and that it addresses the harms the government has identified in its complaint. However, the law does not give the judge the authority to try the case on the merits, block the merger or reject a settlement based on aspects of the merger that the DOJ did not find problematic.

In its merger consent filings, the DOJ routinely states that the standard of review under the Tunney Act is limited to whether the proposed remedies will cure the antitrust violations alleged in a reasonable manner given that the DOJ is entitled to broad discretion.[4] The DOJ argues that the court's role is to evaluate whether the DOJ has breached its duty to the public in consenting to the decree, even if it falls short of what the court would impose on its own. The DOJ also notes that the court's authority to review depends entirely on the DOJ exercising its prosecutorial discretion to bring a case in the first place.

Looking Forward

It will be interesting to see in the coming weeks if Judge Leon follows through on his concerns and orders CVS to hold the Aetna business separate pending his review of the consent agreement. Such a move would be unprecedented and could be costly to the parties. Whether Judge Leon forces the parties to operate separately while he conducts his review, at the end of the process he is limited to deciding whether the agreement the DOJ struck with CVS and Aetna on their Medicare Part D businesses addresses the DOJ's anti-competitive concerns. If he finds it does not, the companies would likely need to renegotiate their settlement with the DOJ or appeal the ruling.

Judge Leon's statements further add to merging parties' concerns regarding the finality of the HSR merger review process, and whether HSR "approval" by the DOJ provides meaningful comfort if the government and private parties remain free to bring successful challenges to consummated mergers.

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[1] Pub.L. 93–528, 88 Stat. 1708, enacted Dec. 21, 1974, 15 U.S.C. § 16.

[2] Press Release, Justice Department Reaches Settlement with Parker-Hannifin, Dec. 18, 2017, available here.

[3] Press Release, Oct. 06, 2018, JELD-WEN Announces Rulings in Steves & Sons Litigation, available here.

[4] Competitive Impact Statement, U.S. v. CVS Healthcare Inc. and Aetna Inc., Case 1:18-cv-02340, D.D.C. Oct. 10, 2018, available here.