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Antitrust Liability in Mergers and Acquisitions: Assessing and Allocating Risk
Structuring Risk-Shifting and Sharing Provisions in M&A Agreements

TUESDAY, MAY 24, 2011
1pm Eastern  |  12pm Central   |  11am Mountain   |  10am Pacific

Today’s faculty features:

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Antitrust Liability in Mergers and Acquisitions: Assessing and Allocating Risk Structuring Risk-Shifting and -Sharing Provisions in M&A Agreements

A Live Interactive 90-Minute Teleconference Program

Tuesday, May 24, 2011
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TODAY’S PROGRAM

✓ Antitrust Risk-Shifting and Risk-Sharing Provisions


Antitrust Liability in Mergers and Acquisitions: Assessing and Allocating Risk
Antitrust Risk-Shifting and Risk-Sharing Provisions

Lynda K. Marshall, Partner

May 24, 2011
Introduction

Types of antitrust risk shifting provisions:
• Reasonable best efforts
• Buyer obligations limited by materiality
• Divestiture obligation capped
• Obligation to divest a specific asset
• No obligation to divest
• Break-up and reverse break-up fees
• Cooperation provisions
Reasonable best efforts provision

Johnson & Johnson / Synthes, Inc. (April 16, 2011)

• “Parent, Merger Sub and the Company shall use their reasonable best efforts to take or cause to be taken all appropriate action, and to do, or cause to be done, all things necessary or reasonably advisable under applicable Laws to consummate and make effective the Transactions, including using their reasonable best efforts to obtain, or cause to be obtained, all waivers, permits, consents, approvals, authorizations, qualifications and Orders of all Governmental Authorities. . . and all parties hereto will cooperate fully with the other parties hereto in promptly seeking to obtain all such waivers, permits, consents, approvals, authorizations, qualifications and Orders.” (§ 7.08(a))

Note:

• “reasonable best efforts” is often left undefined and open to later interpretation by the parties.
Buyer obligations limited by materiality

Motorola, Inc. / Nokia Siemens Networks B.V. (July 16, 2010)

• “…the Purchaser agrees to take promptly any and all steps necessary to avoid or eliminate each and every impediment under any Antitrust Laws that may be asserted by any Federal, state and local and non-United States antitrust or competition authority, . . . , including effecting or committing to effect, by consent decree, hold separate orders, trust or otherwise the sale or disposition of such of its assets or businesses as are required to be divested in order to avoid the entry of, or to effect the dissolution of, any Order in any suit or proceeding, that would otherwise have the effect of preventing or materially delaying the consummation of the Contemplated Transactions; provided, however, that nothing in this Agreement shall require or be construed to require the Purchaser to commit to any undertaking, divestiture, license or hold separate or similar arrangement or conduct of business arrangement or to terminate any relationships, rights or obligations or to do any other act, (i) to the extent such commitment, termination or action would be reasonably likely to be materially adverse to the business, financial condition, or prospects of the Business or the Purchaser Group, taken as a whole, or would be likely to materially impair the expected benefits of the Contemplated Transactions to the Purchaser, or (ii) in order to avoid a second request and/or second phase instituted by a Governmental Entity under applicable Antitrust Laws.” (§ 5.6(d))

Note:

• “any and all steps” may seem to be an all-encompassing obligation for the buyer
• certain actions are limited to those not “reasonably likely to be materially adverse to” or “likely to materially impair” the business (with the definition of materiality purposefully left ambiguous)
• In addition, the buyer is not required to act solely to avoid a second request.
Buyer obligations limited by MAE clause

AMC Entertainment Holdings, Inc. / Kerasotes Showplace Theatres, LLC (December 9, 2009)

• “…Buyer agrees to take any and all steps necessary to avoid or eliminate each and every impediment under any Antitrust Law …including proposing, negotiating, committing to and effecting, by consent decree, hold separate orders or otherwise, the sale, divesture or disposition of such of its…assets, properties or businesses as may be required to be divested in order to avoid the entry of. . . any injunction, temporary restraining order or other order in any suit or proceeding, which would otherwise have the effect of materially delaying or preventing the consummation of the transactions contemplated by this Agreement; provided, however, that Buyer shall not be required to take any actions that would or would be reasonably expected to result in a Regulatory Material Adverse Effect.” (§6.3(e))

Under a consent decree with DOJ, AMC agreed to divest 8 out of 93 theatres purchased.
Divestiture obligation capped

Pfizer, Inc. / Wyeth (January 25, 2009)

• “Notwithstanding the foregoing, neither Parent nor any of its Subsidiaries shall be required to propose, negotiate, commit to or effect any such sale, divestiture or disposition of assets or business of Parent or the Company, . . . where such action, sale, divestiture or disposition, individually or in the aggregate, . . . would result in the one year loss of net sales revenues (as measured by net 2008 sales revenue) in excess of $3,000,000,000.”

The companies agreed to sell approximately one half of Wyeth’s U.S. animal health business assets, with net revenues of approximately $1 billion.
Obligation to divest specified asset

PepsiCo, Inc. / The Quaker Oats Company (December 2, 2000)

• “Notwithstanding anything to the contrary in this Agreement, neither Parent nor any of its Subsidiaries shall be required to dispose of or hold separate, or agree to dispose of or hold separate or restrict its ownership and operation of, all or any portion of the business or assets of the Company and its Subsidiaries or Parent and its Subsidiaries, except that Parent shall be required, if necessary to obtain any regulatory approval from any Governmental Entity necessary for consummation of the Merger, to divest its ALL SPORT beverage brand, without regard to consideration received, no later than the date which is 30 days prior to the date eight months from the date hereof.” (§ 5.3(e))

After considerable regulatory scrutiny, PepsiCo ultimately divested the ALL SPORT brand to avoid action by the Commission. After the divestiture, the Commission closed the investigation into the acquisition without a preliminary injunction or consent order.
No obligation to divest

Dawson Geophysical Company / TGC Industries, Inc. (March 20, 2011)
• “...in no event shall any party hereto be obligated to (i) agree to, or proffer to, divest or hold separate, or enter into any licensing or similar arrangement with respect to, any assets (whether tangible or intangible) or any portion of any business of Parent or of the Company or any of its Subsidiaries or (ii) agree to, or proffer to, limit in any respect the ownership or operation by Parent or the Company or any of its Subsidiaries of any asset (whether tangible or intangible) or any portion of any business of Parent or the Company or any of its Subsidiaries, . . .” (§ 7.5(d))

Sanofi-Aventis / Genzyme Corporation (February 16, 2011)
• General MAE clause: “Parent shall not be required to take any action if such action would, or would reasonably be expected to, have a material adverse impact on the Company or on Parent and its Subsidiaries, taken as a whole.” (§ 6.6(a))
Break-up and reverse break-up fees

Johnson & Johnson / Synthes, Inc. (April 16, 2011)

- “This Agreement may be terminated and the transactions contemplated by this Agreement may be abandoned at any time prior to the Effective Time, as follows…

  (b) by either Parent or the Company if:

  (i) the Effective Time shall not have occurred on or before the Outside Date; 

  provided, however, . . . Parent or the Company may extend the Outside Date for an additional 60 calendar days . . . ;

  (ii) any [government order] hereof shall have become final and nonappealable; provided, however, that the party seeking to terminate this Agreement shall have complied in all material respects with its obligations…

  (c) by Parent…

  (iv) if any Restraint arising under an antitrust, competition, fair trade or similar Law or Order . . . shall be in effect and shall have become final and nonappealable; provided, however, that Parent shall have complied in all material respects with its obligations…” (§ 9.01)

- “In [such] event . . . then [Buyer] shall pay to the [Seller] a fee equal to $650.0 million….,” (§ 9.03(b))
Additional provisions

AMC Entertainment Holdings, Inc. / Kerasotes Showplace Theatres, LLC
(December 9, 2009)

- **Obligation to litigate:** “…Buyer shall defend through litigation any claim asserted in court by any Person in order to avoid entry of, or to have vacated or terminated, any decree, order or judgment (whether temporary, preliminary or permanent) that would prevent the Closing by the Outside Date.” (§6.3(e))

- **Buyer has sole discretion over divestitures:** “Seller shall not, without the Buyer's prior written consent in the Buyer's sole discretion, **discuss or commit to any divestiture transaction**, or discuss or commit to alter their business or commercial practices in any way, or otherwise discuss, take or commit to take any action that limits the Buyer's freedom of action with respect to, or the Buyer's ability to retain any of the business, product lines or assets of, the Business or otherwise receive the full benefits of this Agreement.” (§6.3(e))
Cooperation Provisions

Sanofi-Aventis / Genzyme Corporation (February 16, 2011)

- **Cooperation clause:** “The parties shall also consult and cooperate with one another, and consider in good faith the views of one another, in connection with, and provide to the other parties in advance, any analyses, appearances, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of any party hereto in connection with proceedings under or relating to any Antitrust Laws. . . . [t]he parties hereto agree (A) to give each other reasonable advance notice of all meetings with any Governmental Entity relating to any Antitrust Laws, (B) to give each other an opportunity to participate in each of such meetings, (C) . . . , to give each other reasonable advance notice of all substantive oral communications with any Governmental Entity relating to any Antitrust Laws, (D) if any Governmental Entity initiates a substantive oral communication . . . , to promptly notify the other party of the substance of such communication, (E) to provide each other with a reasonable advance opportunity to review and comment upon all written communications . . . and (F) to provide each other with copies of all written communications to or from any Governmental Entity relating to any Antitrust Laws. Any such disclosures or provision of copies by one party to the other may be made on an outside counsel basis if appropriate.” (§ 6.6(a))
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IMPLICATIONS FOR ANTITRUST AGENCY REVIEW

- Will the risk shifting provisions have any influence on:
  - substantive position of the agencies
  - case evaluation of the agencies
  - timing considerations
IMPLICATIONS FOR ANTITRUST AGENCY REVIEW

- Issues related to disclosure of risk shifting provisions – use of side letters

- HSR matters
  - “Let me be really clear, antitrust side agreements are part of the...filings. And you execute them and you don’t give it to us, do it at your own peril because we will likely find out about it. * * * I’m not going to say don’t worry about it being a roadmap.” (AAG Varney, February 2011).

- Implications
  - Distraction from merits
  - Timing: Bouncing of the filing/No substantial compliance
  - Overemphasize its importance
**Implications for Antitrust Agency Review**

How might an agency lawyer view the AT&T | T-Mobile risk-shifting provisions:

- “to use their respective reasonable best efforts . . . to consummate the Transaction as promptly as reasonably practicable . . .”
  - AT&T need not agree to divestitures: “nothing contained in this Agreement shall require Purchaser to reach any agreements or understandings. . . .”
  - “reasonable best efforts” specifically “includ[es] . . . (v) negotiating, proposing and/or agreeing to Divestiture Sales and other actions, restrictions, limitations or conditions required to obtain any consents, registrations, approvals, permits or authorizations in connection with the Transaction. . . .”

- The agreement requires T-Mobile to cooperate in pre-consummation shop of potential divestiture assets.
IMPLICATIONS FOR ANTITRUST AGENCY REVIEW

- AT&T cannot be required to do things that result in a materially adverse amount to AT&T of greater than $7.8 billion. This would include “conduct” orders that would be assigned a value.

- The agreement terminates on March 20, 2012; unless extended by either party until June 20, 2012, and then expires; unless further extended by either party with an executive certification that regulatory clearance will take place by September 20, 2012.

- If the agreement is terminated, AT&T has to
  - pay $3 billion
  - transfer to T-Mobile certain spectrum that is not needed by AT&T
  - provide a roaming agreement to T-Mobile on terms favorable to both parties.

Suzanne E. Wachsstock
American Express
May 24, 2011
Practical Considerations

- What does the agreement say about the duties of each party to share information with the other? Who is responsible for making strategic decisions? Must the seller agree to cooperate with buyer (and vice versa)?

- The answers likely depend on who bears the risk.

- For example, if buyer bears (all) the risk, there are implications for both parties:
Practical Considerations

• **Buyer may demand:**
  - ✓ Full cooperation from seller
  - ✓ Complete and immediate access to seller’s information and data (copies of all documents produced to the agencies, the ability to attend seller’s meetings with the agencies, etc.)
  - ✓ Full control over communications with the agencies (e.g., no white papers/advocacy letters without buyer’s okay)
  - ✓ Final strategic decision-making authority

• **Seller may demand:**
  - ✓ Reimbursement for costs of merger review
  - ✓ Assurances of some cooperation, participation, and access to buyer’s info – seller may not wish to cede full control; even if buyer officially bears all economic risk, a failed merger can have other implications for seller
  - ✓ More limited information sharing – seller may not want to share certain data for strategic reasons
Anticipating Agency Reaction

- Risk-shifting provisions may be viewed as a “red flag” by the agencies, signaling that the parties anticipate a significant antitrust issue.
  - But agencies are used to these terms – not a big incremental risk
  - There are good reasons to keep these provisions in
  - Putting these provisions in a “side letter” or joint defense agreement isn’t the answer

- If the agreement specifies which assets the buyer must divest to obtain clearance, it may serve as a blueprint for the antitrust agencies to determine the most likely area of competitive concern.
  - AAG Varney: will use these terms as a “roadmap”

- Such provisions, as well as those that have explicit deadlines about Second Request compliance, may limit the parties’ ability to negotiate a remedy with the antitrust agencies.
  - Structural remedies
  - Behavioral remedies
  - Timing considerations
Consider Antitrust Provisions Collectively

All antitrust provisions in an agreement are related – you must consider them as a whole.

Examples of provisions that interplay with risk shifting provisions:

- **Agreement “drop dead” date**
  - Is there sufficient time to comply with a Second Request? Negotiate a remedy? Litigate?
  - Buyer might want to be able to walk away; seller might want the buyer to litigate if necessary.

- **Closing conditions**
  - Some agreements require HSR filings within X days after execution – may limit the parties’ ability to approach the agencies after the deal is public and before filing.

- **Gun–jumping provisions**
  - What type of information is exchanged before closing? How much control does buyer have of seller’s business before closing?
  - Antitrust agencies are increasingly sensitive to these issues. If they investigate, it will shift focus away from the merger investigation, and significant penalties may be imposed.
Sharing Analysis of Antitrust Risk

Should the parties work together to analyze the antitrust risk of a deal?

- **Pros**: The more information available from both parties up front, the more likely that the parties can remedy competitive issues prior to a Second Request.
  - Buyer might agree to purchase only the non-overlapping businesses.
  - Parties can identify a buyer for the overlapping businesses.
  - Parties can approach the agencies to address and resolve any issues within the first 30 days (without a Second Request).

- **Cons**: One side might have incentives for not disclosing all possible competitive concerns.
  - For example, buyer might be developing a new business to compete with seller’s business. If buyer discloses this info to seller, seller’s counsel may demand a higher break-up fee or put the brakes on the deal altogether.
  - Seller may want to shield its counsel’s concerns in hopes of convincing buyer to move forward.
Sharing Analysis of Antitrust Risk

- **Other Considerations:**
  - Information should be shared under a strict joint defense agreement to protect legal privilege.
    - But: timing considerations – are communications in advance of contract signing covered by joint defense privilege?
  - Consider using a “clean team” to protect confidentiality of information.
International Considerations

- Should the parties include mandatory and/or voluntary foreign filing requirements as conditions to closing?

- Seller wants to make sure that all conditions to closing are clearly set out in the agreement, including foreign filing requirements.
  - Some foreign pre-merger regulations are voluntary and some are vague.
  - Some foreign filings are extremely burdensome and time-consuming.
  - It’s often a risk-assessment as to whether to file.
  - Seller does not want to hold up closing if buyer decides at the last minute that a filing in the Ukraine is “mandatory”.

- Requires that parties conduct the foreign filing analysis prior to execution of the agreement.

- Parties can negotiate not only where to file, but also which party is responsible for the filing, who pays filing fees, and when they must file.