Federal Trade Commission

Consummated Merger Challenges – The Past Is Never Dead

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There couldn't be a better time for a discussion of consummated merger challenges. The Commission's challenge to Polypore's consummated acquisition of Microporous is currently before the Eleventh Circuit; the Commission recently announced its decision in the ProMedica/St. Luke's consummated hospital merger proceeding, and consummated merger investigations have in recent years become an increasingly important part of the FTC's caseload.

I'll begin by providing some statistics regarding the FTC's enforcement of consummated mergers. I'll then provide an overview of the FTC's most significant recent consummated merger challenges. Next I'll describe sources of evidence in FTC investigations of consummated mergers, my preferred approach to litigating consummated merger challenges, and the remedies

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Darren Tucker, for his invaluable assistance in preparing this paper.

the FTC seeks for consummated mergers. Finally, I'll address some criticisms regarding the way the FTC reviews consummated mergers.

I.A.

Since the premerger notification filing thresholds substantially increased in 2001, both agencies have investigated and challenged a number of consummated mergers. During the Bush administration, the FTC and DOJ together challenged eighteen consummated mergers.[1] During Chairman Leibowitz's term, which began in March 2009, the FTC has challenged nine consummated transactions.[2] Consummated merger challenges made up about one-fifth of our total merger challenges during that time.[3]

Agency challenges to consummated mergers are far more likely to result in litigation than challenges to unconsummated mergers. Four of the nine consummated merger challenges under our current Chairman resulted in litigation;[4] the remaining five resulted in consent decrees without litigation.[5] In other words, almost half of the FTC's challenges to consummated mergers resulted in litigation. In contrast, only 6 of the 39 challenges to unconsummated mergers resulted in litigation; the other 33 resulted in consents. Why do we see this difference? Arguably, the merging parties are more willing to litigate because there is more at stake in a consummated merger due to the greater cost to unwind a consummated deal relative to an

[1] *See* Ilene Knable Gotts & James F. Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, Competition Pol'y Int'l, Spring 2009.

[2] *See* notes 4 and 5 *infra*.

[3] The FTC challenged a total of 48 mergers during that time. $^{9}/_{48} = 0.1875$.

[4] These were Carillion/CAI (2009), D&B/QED (2010), LabCorp/Westcliff (2010), and ProMedica/St Luke's (2010). The parties in Carillion/CAI and D&B/QED entered into a consent agreement prior to resolution of the litigation.

[5] These were Houghton/Stuart (2010), Fidelity/LandAmerica (2010), Nufarm/A.H. Marks (2010), Topps/Penn Traffic (2010), and Cardinal Health/Biotech (2011).

unconsummated transaction. From Complaint Counsel's perspective, it's easier to try a consummated merger case because there is less need to predict or speculate; one can determine what actually happened post-merger.

To illustrate, in 2004, the Commission issued an administrative complaint against Evanston Northwestern Healthcare Corporation, challenging its 2000 acquisition of Highland Park Hospital.[6] In the meantime, the merging hospitals had functioned together, including the merging of their heart surgery programs. That is arguably why the acquiring hospital fought so hard to save the transaction. For its part, it's arguable that Complaint Counsel were more willing to litigate because they could focus on what actually happened to prices post-merger instead of speculating about what probably would happen. The ALJ found that the transaction violated Section 7 of the Clayton Act by substantially reducing competition for acute inpatient hospital services and ordered Evanston to divest Highland Park. The Commission affirmed the ALJ's order as to liability,[7] finding that the transaction enabled the merged firm to exercise market power and that the resulting anticompetitive effects were not offset by merger-specific efficiencies. The Commission nevertheless reversed the ALJ's divesture remedy due to the high costs of separating hospitals that had functioned together as a merged entity for seven years. Instead, the Commission imposed a conduct remedy. I'll discuss that aspect of the case in more detail later in my remarks.

In October 2001, the Commission issued an administrative complaint against Chicago Bridge & Iron for its acquisition earlier that year of the Water Division and Engineered

[6] Materials related to the *Evanston* case are available at http://www.ftc.gov/os/adjpro/d9315/index.shtm.

[7] Opinion of the Commission, Evanston Northwestern Healthcare Corporation, Docket No. 9315, 2007 FTC LEXIS 210 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

Construction Division of Pitt-Des Moines.[8] In 2005, the Commission found that the transaction violated Section 7 by combining the two dominant domestic suppliers of certain types of industrial and water storage tanks. The Commission required Chicago Bridge to create and then divest a new stand-alone division capable of competing in the relevant markets within six months. Chicago Bridge appealed to the Fifth Circuit, which denied the petition for review and upheld the Commission's order.[9] According to the court, the FTC applied the correct legal standards, properly analyzed respondent's "potential entry" claim, relied on substantial evidence for its factual findings, and did not abuse its discretion in crafting a remedy. Again, the parties to the transaction were arguably more eager to fight because they had already closed. And, again, it is arguable that Complaint Counsel were more eager to litigate because they didn't have to speculate about what might happen after the transaction closed.

In the *Lundbeck* case,[10] the Commission alleged that Lundbeck acquired the only two drugs that treated a condition known as PDA, resulting in a merger to monopoly. Unlike the other cases I've mentioned, the FTC chose to bring this case in federal district court, rather than in Part 3. Following a bench trial, the District Court for the District of Minnesota denied the FTC's request for relief, finding that the agency had failed to prove that the two drugs were in the same relevant market.[11] The court reasoned that the cross-price elasticity between the two products was "very low" based on testimony from neonatologists that they choose between the

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[8] Materials related to the *Chicago Bridge* case are available at http://www.ftc.gov/os/adjpro/d9300/index.shtm.

[9] *Chicago Bridge & Iron Co. v. FTC*, 515 F.3d 447 (5th Cir. 2008).

[10] Materials related to the *Lundbeck* case – which is also referred to as the *Ovation* case – are available at http://www.ftc.gov/os/caselist/0810156/index.shtm.

[11] *FTC v. Lundbeck, Inc.*, Civil Nos. 08-6379, 08-8381 (JNE/JJG), 2010-2 Trade Cas. (CCH) ¶ 77,160, 2010 U.S. Dist. LEXIS 95365 (D. Minn. Aug. 31, 2010), *aff'd*, 2011-2 Trade Cas. (CCH) ¶ 77,570, 2011 U.S. App. LEXIS 17231 (8th Cir. Aug. 19, 2011).

two drugs for reasons other than price. The Eighth Circuit affirmed on the basis that the district court's conclusions with respect to the relevant market were findings of fact that were entitled to deference on appeal. Contrary to my wishes,[12] the Commission decided not to seek certiorari to the Supreme Court.[13] Again, the parties were probably willing to litigate because they had already closed the transaction and because the Commission had sought a disgorgement remedy. The Commission was ready to litigate because we could focus on the price increase and the non-price injury to competition that had already occurred.

Finally, in the *Polypore* case, the Commission challenged a 2008 consummated acquisition involving rival manufacturers of battery components. The matter was tried before an FTC ALJ in 2009, who determined that Polypore's acquisition of Microporous was anticompetitive in four North American battery separator markets.[14] In December 2010, the Commission unanimously affirmed the ALJ's finding of liability in three of the four markets, but reversed the ALJ and ruled in favor of Polypore with regard to one market.[15] The Commission's opinion relied not only on a traditional structural case, but also evidence of actual anticompetitive effects following the transaction. The Commission ordered Polypore to divest

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[12] Statement of Commissioner J. Thomas Rosch in FTC v. Lundbeck, Inc., FTC File No. 0810156 (Jan. 20, 2012), *available at* http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-rosch.pdf.

[13] Statement of Chairman Leibowitz, Commissioner Ramirez, and Commissioner Brill Regarding FTC v. Lundeck, Inc., FTC File No. 0810156 (Jan. 20, 2012), *available at* http://www.ftc.gov/os/closings/publicltrs/120120lundbeck-jdl-brill-ramirez.pdf.

[14] The ALJ also ruled that a 2001 joint marketing agreement between Polypore and a rival battery separator manufacturer illegally divided up the markets for particular types of battery separators, and ordered Polypore to amend the agreement to terminate and declare null and void the covenant not to compete. The ALJ dismissed a separate allegation that Polypore engaged in exclusionary conduct in specific battery separator markets. Neither of these findings was appealed to the Commission.

[15] Opinion of the Commission, Polypore Int'l Inc., Docket No. 9327 (Nov. 5, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeopinion.pdf.

the acquired company to an FTC-approved buyer within six months. Polypore appealed the Commission's decision to the Eleventh Circuit. Oral argument was held in January, and we expect a decision from the court any day. I will not say any more about this case except to note that I issued a separate statement observing that because it was a consummated transaction, we could focus on what actually happened instead of predicting what might happen after the transaction closed.[16]

I.B.

Although we frequently speak of consummated versus unconsummated transactions, there is, in fact, a third category – what I'll call partially-consummated transactions. Let me explain what I mean by that. During some merger investigations, our staff will negotiate a hold separate arrangement with the parties that allows them to close and integrate some functions but maintains our ability to obtain structural relief if the merger is found to violate Section 7. The Commission has recently challenged two transactions that had closed pursuant to hold separate agreements: the ProMedica/St. Luke's hospital merger and the LabCorp/Westcliff laboratory testing merger. Both of these challenges resulted in litigation.

The *ProMedica* case involved the August 2011 acquisition of St. Luke's Hospital by ProMedica Health System,[17] which operates three general acute-care hospitals in the Toledo, Ohio area. Prior to the closing, ProMedica agreed with Commission staff to a hold separate agreement that maintained the competitive viability of St. Luke's and prevented ProMedica from renegotiating health-plan contracts or raising the rates it charged to health plans.

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[16] Concurring Opinion of Commissioner J. Thomas Rosch, Polypore Int'l, Inc., Docket No. 9327 (Nov. 5, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeconcurringopinion.pdf.

[17] Materials related to the *ProMedica* case are available at http://www.ftc.gov/os/adjpro/d9346/index.shtm.

In January 2011, the Commission filed an administrative complaint in Part 3 challenging the transaction, and, along with the State of Ohio, also sought a preliminary injunction in federal district court seeking an order requiring ProMedica to preserve St. Luke's as a separate, independent competitor during the FTC's administrative proceeding. Just two and a half months later, the district court entered a preliminary injunction holding the parties to the terms of their hold separate agreement pending the outcome of the administrative proceedings.[18]

ProMedica did not appeal its loss in federal district court but did press on in the administrative litigation. In December 2011, after a full trial on the merits, an FTC ALJ issued a 238-page decision finding that the transaction is likely to substantially lessen competition in the market for the sale of general acute-care inpatient hospital services to commercial health plans in Lucas County, Ohio.[19] The ALJ issued an order requiring ProMedica to divest St. Luke's.

ProMedica appealed this decision to the Commission, and just last week the Commission issued an opinion affirming the ALJ's decision and order.[20] The Commission found that the transaction would reduce the number of Toledo-area hospitals providing general acute care services from four to three; that St. Luke's weakened competitor defense was without merit; that ProMedica would have significantly greater bargaining leverage with payors post-transaction; that, as the parties themselves predicted, the transaction would likely lead to higher prices; that payors would not be able to constrain ProMedica from exercising its enhanced market power;

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[18] *FTC v. ProMedica Health System*, No. 3:11 CV 47, 2011 U.S. Dist. LEXIS 33434 (N.D. Ohio Mar. 29, 2011). Specifically, the court required the continuation of the pre-acquisition prohibition on ProMedica's termination of St. Luke's MCO contracts, while providing MCOs the option to extend their existing contracts with St. Luke's if a new contract was not reached.

[19] Initial Decision, ProMedica Health System, Inc., Docket No. 9346 (Dec. 5, 2011), *available at* http://www.ftc.gov/os/adjpro/d9346/120105promedicadecision.pdf.

[20] Opinion of the Commission, ProMedica Health System, Inc., Docket No. 9346 (Mar. 22, 2012), *available at* http://www.ftc.gov/os/adjpro/d9346/120328promedicabrillopinion.pdf.

and that competitors would not be able to reposition. I issued a concurring statement taking issue with the majority's product market definition and its over-emphasis on econometric evidence, but agreed with the majority that resolution of these issues had no bearing on the outcome of the case.[21]

As an aside, I believe this case vindicates our recent efforts to expedite Part 3 litigation. Not only does this case represent the first time in recent memory that a respondent has continued to litigate a merger in Part 3 after losing a PI, but ProMedica was able to get a full trial on the merits before an ALJ *and* a decision on its appeal to the Commission in just fourteen months.

The *LabCorp/Westcliff* litigation began much the same way as the *ProMedica* case but with a very different outcome.[22] In June 2010, Laboratory Corporation of America acquired rival clinical laboratory testing company Westcliff Medical Laboratories. One week later, Commission staff and LabCorp entered into a hold separate agreement that preserved the Commission's ability to obtain effective and prompt structural relief should it prevail in an administrative proceeding. In December 2010, the Commission challenged the transaction in Part 3 alleging that it would lead to higher prices and lower quality for the sale of clinical laboratory testing services to physician groups in Southern California. The Commission also sought a preliminary injunction in federal district court to extend the terms of the hold separate

[21] Concurring Opinion of Commissioner J. Thomas Rosch, ProMedica Health System, Inc., Docket No. 9346 (Mar. 22, 2012), *available at* http://www.ftc.gov/os/adjpro/d9346/120328promedicaroschopinion.pdf. The views expressed in my concurring opinion and in these remarks are without prejudice to any subsequent motions filed by ProMedica under FTC Rule 3.55 or 3.56.

[22] Materials related to the LabCorp/WestCliff case are available at http://www.ftc.gov/os/adjpro/d9345/index.shtm.

and require LabCorp to maintain WestCliff's assets pending the outcome of the administrative proceeding.[23]

In February 2011, the District Court for the Central District of California denied the FTC's request for a preliminary injunction.[24] The court held that the FTC's alleged product market was too narrow, that there were many competitors in the proper relevant market, that entry was easy, and that the private equities were significant on account of Westcliff's precarious finances. The FTC sought a stay pending appeal but was denied by both the district court and Ninth Circuit.[25] As a result, the Commission withdrew its appeal and terminated the Part 3 administrative litigation.

II.

Next, I'd like to describe the sources of evidence we use in a consummated merger and how they differ from unconsummated mergers.

The 2010 Merger Guidelines for the first time address the topic of consummated mergers. Section 2.1.1 of those Guidelines states that the antitrust agencies "consider the same types of evidence they consider when evaluating unconsummated mergers." However, that section also

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[23] I dissented from challenging the transaction, explaining that even though I believed there was "reason to believe that this transaction [would] have anticompetitive effects, I cannot support a complaint that alleges an erroneous definition of the relevant product market." Dissenting Statement of Commissioner J. Thomas Rosch in the Matter of Laboratory Corporation of America and Laboratory Corporation of America Holdings, FTC Docket No. 9345, File No. 101 0152 (Nov. 30, 2010), *available at* http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdisstatement.pdf.

[24] *FTC v. Lab. Corp. of America*, Case No. SACV 10-1873 AG (MLGx), 2011-1 Trade Cas. (CCH) ¶ 77,348, 2011 U.S. Dist. LEXIS 20354 (C.D. Cal. Feb. 22, 2011).

[25] *FTC v. Lab. Corp. of America*, No. 11-55293 (9th Cir. Mar. 14, 2011), *available at* http://www.ftc.gov/os/caselist/1010152/110314labcorporder-cca.pdf ("Appellant's opposed emergency motion for injunctive relief is denied."); FTC v. Laboratory Corp. of America, Case No. SACV 10-1873 AG (MLGx), 2011-1 Trade Cas. (CCH) ¶ 77,355, 2011 U.S. Dist. LEXIS 29144 (C.D. Cal. Feb. 25, 2011).

states that "[e]vidence of observed post-merger price increases or other changes adverse to customers is given substantial weight." In fact, if the reviewing agency determines that these changes resulted from the merger, "they can be dispositive" and the decision of whether to challenge the transaction may be at an end. An implication of this is that the agencies might not bother to define the relevant market or determine concentration levels when there is evidence of actual anticompetitive effects from a consummated transaction.[26]

This section of the new Guidelines, as well as other language endorsing the use of direct effects evidence, is one of the principal advancements in the 2010 Guidelines, in my judgment. This type of evidence offers a number of advantages over inferences drawn from market definition and concentration. Market definition, of course, is not an end in itself but rather an indirect means of determining the presence of market power or the likelihood that it will be exercised. Focusing on market definition risks obscuring the ultimate question under Section 7 of the Clayton Act, which is whether the transaction is likely to substantially lessen competition. The answer to that question may turn on market definition, but it doesn't have to.

Another benefit of looking first to any actual anticompetitive effects is its potential to help define the relevant market. I have described this as "backing into" the market definition. Others have described competitive effects and market definition as "two sides of the same coin."[27] Both mean the same thing to me: the relevant market can sometimes be defined through the competitive effects evidence.

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[26] *See also* 2010 Merger Guidelines § 4 ("Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.").

[27] Brief of Appellant at 38, FTC v. Whole Foods Market, Inc., No. 07-5276 (D.C. Cir. Jan. 14, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf.

I also think a focus on actual anticompetitive effects is an easier story for a court to understand.[28] A case focused on market definition risks getting bogged down in esoteric fights over critical loss analysis or the SSNIP test. In contrast, a court is likely to be persuaded that a merger that resulted in a price increase violates Section 7, even if the court harbors some doubts about the precise relevant market.

The FTC has, in fact, placed weight on evidence of actual anticompetitive effects in its recent consummated merger challenges. For example, in *Lundbeck*, the agency presented evidence that shortly after the transaction was consummated, prices increased nearly 1,300 percent.[29] In *Evanston*, the Commission found that the merged firm raised its prices to managed care organizations immediately after consummation of the transaction. This finding was consistent with post-merger business documents from Evanston.

Nevertheless, the Commission has not yet gone as far as the 2010 Guidelines would suggest in terms of moving away from an upfront structural case and toward the use of direct evidence of a merger's anticompetitive effects. Perhaps the best example of that is the Commission's December 2010 opinion in the *Polypore* case.[30]

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[28] *See generally* Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, Competition Pol'y Int'l, Spring 2009, at 35 (arguing that generalist judges lack economic training (and often interest) and that, as such, if economic evidence is to be persuasive, it must be communicated in a way that a generalist can understand and must be consistent with other evidence).

[29] *FTC v. Lundbeck, Inc.*, Civil Nos. 08-6379, 08-6381, 2010 WL 3810015 (D. Minn. Aug. 31, 2010).

[30] Another good, but less recent, example is the *Evanston* case. The first count of the administrative complaint in *Evanston* alleged that the merger violated Section 7 of the Clayton Act in certain relevant product and geographic markets. The second count charged that the transaction violated the Clayton Act because it enabled Evanston to raise its prices to private payors. Unlike the first count, however, the second count did not allege a particular product or geographic market and did not incorporate the complaint's earlier product market and geographic market allegations by reference. Both the ALJ and the Commission found liability under Count I but declined to reach the question of whether there was liability under Count II.

Polypore, as I've said, involved a consummated merger that resulted in significant price increases.[31] There was also compelling evidence in *Polypore* that the transaction was motivated by an expectation of reduced competition and higher prices. The Commission's decision acknowledged that both the courts and the Commission have recognized that the traditional burden-shifting framework that begins with defining the relevant market "does not exhaust the possible ways to prove a § 7 violation on the merits."[32] The opinion also stated that "[i]n a consummated merger, post-acquisition evidence of actual anticompetitive harm may in some cases be sufficient to establish Section 7 liability without separate proof of market definition."[33] Nevertheless, the Commission's opinion embraced a traditional analytical framework, including precise upfront market definition, before turning to consideration of the transaction's competitive effects.[34]

As I said, I wrote a concurring opinion praising the rigor of the Commission opinion but lamenting that the Commission had declined to take the opportunity to apply the advances in the

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As I pointed out in my concurring opinion, "when a merger has been consummated and the evidence shows it has had actual anticompetitive unilateral effects, the law allows liability to be established by direct evidence of those effects, without initially defining a relevant market using Merger Guidelines methodology, at least where, as here, the evidence of anticompetitive effects identifies the 'rough contours' of the market." Concurring Opinion of Commissioner J. Thomas Rosch at 8, Evanston Northwestern Healthcare Corp., Docket No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf.

[31] Opinion of the Commission, Polypore Int'l, Inc., Docket No. 9327 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeopinion.pdf.

[32] *Id*. at 11 (quoting *FTC v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.)).

[33] *Id*.

[34] *Id*. ("Both Complaint Counsel and Respondent developed their evidence and litigated this case by reference to a relevant market and this traditional burden-shifting framework. The ALJ relied on the same legal framework in the ID. We find that this framework illuminates the factual record and competitive issues in this case and therefore apply it in this opinion."). The same can be said for the Commission's decision in *Evanston*.

2010 Guidelines. I explained that "especially where, as here, the merger at issue is consummated, it is generally preferable to determine whether a merger has had anticompetitive effects by reference to the parties' motives for the transaction and the actual effects resulting from the merger instead of trying first to define with precision the dimensions of relevant market."[35]

Of course, the FTC may challenge a consummated merger even without evidence of higher prices, lower output, or other anticompetitive effects from the merger. As the 2010 Guidelines note, "a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct."[36] In the FTC's federal court challenges to the LabCorp/Westcliff and ProMedica/St. Luke's transactions, for example, the agency did not cite to any evidence of actual anticompetitive effects from the transactions in the complaints. This was hardly surprising, given that these litigations began just a few months after the transactions closed and that the parties were aware of the FTC's investigation at the time of closing.

III.

Next, I'd like to discuss how the FTC should litigate consummated merger cases.[37] To begin with, we should ask ourselves how the top plaintiffs' trial lawyers try their cases and why they try them that way. We can learn something from them.

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[35] Concurring Opinion of Commissioner J. Thomas Rosch at 5, In re Polypore Int'l, Inc., Docket No. 9327 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeconcurringopinion.pdf.

[36] 2010 Merger Guidelines § 2.1.1.

[37] My views on the proper way to litigate an antitrust case are described in more detail in J. Thomas Rosch, Comm/r, Fed. Trade Comm'n, Can Antitrust Trial Skills Really Be "Mastered"? Tales Out of School About How to Try (or Not to Try) an Antitrust Case, Remarks Before the

First, the best plaintiffs' lawyers consider it imperative to tell a short but comprehensible story. For this reason, in closed-door Commission meetings to consider a complaint recommendation, we've taken to pressing the staff litigating a case to spell out in detail what the storyline at trial will be before we'll agree to vote out a complaint. If the lead attorney can't summarize a compelling storyline that plays up our strengths and responds to our weaknesses in a few concise sentences, then we won't vote out the complaint. It's as simple as that.

Second, the best trial lawyers also do a terrific job of figuring out *how* to tell that story – in other words, which witnesses and documents will be the most persuasive. They rely on adverse witnesses' documents and other statements. In fact, they almost always begin their cases by calling as witnesses the opposing party's CEO or Chairman. One benefit to this approach is that is that these key witnesses are in a defensive posture from the get-go and are unable to lead off with a canned explanation for why the transaction is procompetitive. Starting with the defendant's senior executives is also useful because they are hostile witnesses, so the agency can cross-examine them and control the testimony.

Great trial lawyers do not rely on customer witnesses or on other third party witnesses except as frosting on the cake; much less do they rely on affidavits from those witnesses to make their cases. Why is that? Customer and competitor witnesses are not easy to control, for one thing.[38] In addition, courts sometimes perceive that customers have a built-in bias against mergers. Also, it's difficult to present customer testimony in a fashion that is not cumulative, on

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ABA Antitrust Masters Course (Sept. 30, 2010), *available at* http://www.ftc.gov/speeches/rosch/100930roschmasterscourseremarks.pdf.

[38] Customer witnesses cannot ordinarily be led or otherwise cross-examined once they have been interviewed by counsel because they are not hostile witnesses.

the one hand, and is representative, on the other hand.[39] Finally, customer witnesses can very rarely be used to present documentary evidence. Use of *competitors* as primary story-tellers raises similar but even more substantial concerns.

My *third* and final observation about how to best try an antitrust case is that I believe the best crafted stories place little, if any, emphasis on complex economic formulae. When I see an economic formula, my eyes start to glaze over, and I believe that's the way courts and juries view this evidence too. In a consummated merger case, it may be necessary to call an economist to offer testimony on any actual anticompetitive effects from the transaction. But this evidence will be far more persuasive if you have other testimonial and documentary evidence to back it up.

IV.

The next topic I'd like to address is the extent to which the remedies the FTC seeks may differ for consummated versus unconsummated mergers. This issue arises out of the *Evanston* case.

The FTC's position has long been that structural remedies are preferred for Section 7 violations, regardless of whether the challenge occurs before or after consummation.[40] A divestiture remedy is more likely to restore competition than a conduct remedy and does not entail long-term monitoring of the respondent.

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[39] *See generally* Darren S. Tucker et. al, *The Customer is Sometimes Right: The Role of Customer Views in Merger Investigations*, 3 J. Comp. L. & Econ. 551 (2007).

[40] Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm (for "the majority of horizontal merger cases, . . . the Commission will require a divestiture to remedy the likely anticompetitive effects"); Fed. Trade Comm'n, Bureau of Competition, Frequently Asked Questions About Merger Consent Order Provisions, http://www.ftc.gov/bc/mergerfaq.shtm ("most orders relating to a horizontal merger will require a divestiture"); *see also United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961) (calling divestiture a "natural remedy" for an illegal merger).

Notwithstanding this strong preference for structural relief, in the *Evanston* case, the Commission declined to require divestiture of Highland Park, the acquired hospital, and instead imposed a conduct remedy. The Commission opinion pointed to four factors that led it to this conclusion:

- "A long time elapsed between the closing of the merger and the conclusion of the litigation";
- Evanston had integrated the operations of Highland Park with two other local Evanston hospitals;
- Some of the post-merger improvements at Highland Park would not survive a divestiture; and
- These post-merger improvements would take a long time for Highland Park to recreate on its own after a divestiture.[41]

The Commission pointed to two significant post-merger improvements at Highland Park that were at risk in the event of a divestiture: the cardiac surgery program and a state-of-the-art electronic medical records system. Without the other Evanston hospitals, it was not clear that Highland Park would have the volume that it needed to maintain its cardiac surgery program. Loss of this program would have also put at risk Highland Park's interventional cardiology services. In addition, the Commission was concerned about the effect of divestiture on Highland Park's ability to deploy a modern medical records system. It likely would have taken considerable time and expense for Highland Park to deploy its own medical records system and the switchover could have compromised patient care.

As a result, the Commission rejected divestiture as a remedy and instead required Evanston to establish a separate negotiating team for Highland Park to compete for payors'

[41] Opinion of the Commission at 88-91, Evanston Northwestern Healthcare Corp., Docket No. 9315, 2007 FTC LEXIS 210 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

business. In addition, Evanston was required to permit payors to negotiate separate contracts for Highland Park and was prohibited from making any contract or prices for Highland Park contingent on entering into a contract for other Evanston hospitals, or vice-versa. The Final Order also required Evanston to establish a firewall between its negotiating teams and to submit disputes with payors resulting from the separate negotiations to mediation and, if that was not successful, to binding arbitration.

The Commission opinion emphasized that the *Evanston* case was "highly unusual" and that the Commission's rationale for imposing a conduct remedy was unlikely to be applicable to most future merger challenges.[42] The Commission explained that "divestiture will almost always be ordered" for unconsummated mergers or for mergers that close during a Commission investigation.[43]

Nevertheless, some have wondered whether the Commission's rationale for imposing a conduct remedy is as limited as the Commission claimed.[44] Some have wondered whether the existence of post-merger efficiencies would act as a trump card in future merger challenges, preventing the Commission from imposing structural relief anytime the respondent could point to some verifiable post-merger product or service improvement.

My response to this is twofold. *First*, the Commission opinion makes clear that the mere existence of some post-merger improvements are not enough to warrant conduct relief. Rather,

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[42] *Id.*; *see also* Opinion of the Commission on Remedy at 11, Evanston Northwestern Healthcare Corp., Docket No. 9315, 2008 FTC LEXIS 62 (Apr. 28, 2008), *available at* http://www.ftc.gov/os/adjpro/d9315/080428commopinionon remedy.pdf ("[T]he circumstances of this case are extraordinary.").

[43] Evanston Remedy Opinion, *supra* note 42, at 11.

[44] *See, e.g.*, Mark J. Botti, *Observations on the Commission's Evanston Remedy: When is Divestiture or Any Remedy, Not Appropriate for a Consummated Anticompetitive Merger?*, Global Competition Pol'y, May 2008, at 1, 8 ("[T]he decision does not address why the facts of *Evanston* are extraordinary if compared to other fully consummated mergers.").

those improvements must be significant, unable to survive a divestiture, difficult to recreate, and not have occurred during the Commission's investigation. These strike me as fairly rigorous criteria that will rarely be satisfied.

Second, consider the relief the Commission has actually obtained in its consummated merger challenges since the *Evanston* case. In the *Polypore* matter, the Commission ordered *complete* divestiture. That is, the Commission required Polypore to divest *all* of the acquired assets, even those outside the relevant geographic market. The Commission's rationale was that a complete divestiture would help eliminate a capacity constraint in North America and would allow the acquirer to better offer customers the benefits they desire (such as multi-plant sourcing).

Likewise, in the *ProMedica* matter, both the ALJ and the Commission ordered complete divestiture by requiring the sale of St. Luke's to a Commission-approved buyer. The Commission noted that unlike *Evanston*, there had been no delay challenging the transaction after its closing and that the existence of a Hold Separate Agreement had preserved St. Luke's ability to once-again serve as an independent and viable competitor. The Commission rejected arguments concerning the cost of unwinding the one service line that had been integrated (inpatient rehabilitation services), explaining that "[a]ny unwinding of a consummated merger found to be unlawful is bound to entail some costs, but that in itself is not sufficient reason to forgo requiring divestiture."[45]

[45] ProMedica Commission Opinion, *supra* note 20, at 58.

In addition, *every one* of the Commission's most recent consent decrees resolving challenges to consummated mergers involved structural relief.[46] Thus, I think it's fair to say that structural relief continues to be the standard remedy in FTC consummated merger challenges and that *Evanston* remains the exception to the rule.

V.

Finally, I would like to address the criticism we sometimes receive from the private bar regarding the way we investigate consummated mergers. Although stated in different ways, the primary complaint I've heard is that we are too slow and allow investigations and administrative proceedings to drag on for far too long. My response to these complaints may surprise you – because I largely agree with them.

When investigating a merger subject to the HSR Act, the agency has 30 days from the time both parties comply with the Second Requests to go into court to challenge the deal.[47] To be sure, parties often give the Commission additional time to consider their arguments. But even in these cases, our staff needs to make a recommendation to the Commission within a few weeks after Second Request compliance. As a result, our staff has a strong incentive to conduct investigations expeditiously and to make enforcement recommendations in short order.

Contrast that to an investigation not subject to the HSR Act. In those investigations, our staff has no hard deadline to complete its investigation or to prepare its recommendation memos to the Commission. Instead, staff's incentive is to turn over every nook and cranny in the investigation to minimize the risk of a surprise down the road. Staff also has a greater incentive

[46] Those cases are Carilion/CIA (2009), MDR/QED (2009), Houghton/Stuart (2010), Fidelity/LandAmerica (2010), Nufarm/A.H. Marks (2010), Topps/Penn Traffic (2010), and Cardinal Health/Biotech (2011).

[47] 16 C.F.R. 803.10(b). For cash tender offers and acquisitions in bankruptcy, the FTC has 15 days. *See id.*

to grant extensions to third parties to comply with compulsory process, which further delays completing the investigation.

Although I don't have any hard data on this, it wouldn't surprise me if investigations of consummated mergers at the FTC take on average twice as long to complete as investigations of unconsummated mergers. Protracted investigations are problematic for several reasons. First, we need to challenge and unwind anticompetitive transactions as quickly as possible to minimize consumer injury. The longer we wait, the greater the problem of "unscrambling the eggs" becomes. Second, lengthy investigations can lead to uncertainty in the marketplace. Customers, vendors, and even employees may go elsewhere out of a fear that the merged entity will be broken up, even if, ultimately, the agency concludes there is no violation. Third, the merged entity itself may react to an extended investigation by pulling some of its competitive punches in the marketplace. Curtailing competition on the merits is the last thing the Commission wants to do. Fourth, extended investigations (of any kind) can cause significant financial and manpower burdens not only on targets of the investigation but also on third parties subject to compulsory process.

It would be unfair, however, to point the blame for these problems solely at our staff. In a consummated merger investigation, the respondent sometimes has nothing to gain from a rapid conclusion to the investigation. Thus, we sometimes see attorneys engaging in delaying tactics or providing incomplete responses to compulsory process. At times, we have had to resort to enforcement actions in district court to ensure compliance with compulsory process.

To some extent, I also blame the Commission itself. Although the Commission has reformed our Part 3 rules to expedite administrative hearings,[48] we haven't made similar changes to our rules to expedite investigations[49] and haven't insisted that our staff complete consummated merger investigations within a reasonable timeframe. In addition, the Commission is sometimes just as guilty of moving slowly. Without the HSR clock, it's easy for a single Commissioner to delay the Commission meeting or to request more time before voting.

What's the solution to this problem? My suggestion would be that in non-HSR merger investigations, we offer a timing agreement to the parties that requires the Commission to make a decision within a certain timeframe. This could be a hard deadline, such as six months from the issuance of compulsory process, or process approach, where we all act as though the transaction were subject to the HSR Act. (I understand the Antitrust Division offers this latter option.) In return, the respondent would agree to comply with compulsory process on a certain schedule and not to further integrate the two companies. A timing agreement would not be mandatory; if parties want to continue under the current system, they would retain that option.

[48] On October 7, 2008, the FTC published a Notice of Proposed Rulemaking detailing proposed rule revisions and inviting public comment. *See* 73 Fed. Reg. 58,832. On January 13, 2009, the FTC published interim final rules, which governed all proceedings commenced after that day. *See* 74 Fed. Reg. 1,804. On May 1, 2009, the Commission published final rules, adopting the interim rules subject to a few revisions. *See* 74 Fed. Reg. 20,205. The final rules govern all proceedings initiated on or after May 1, 2009. *See id.*

[49] *See* Concurring and Dissenting Statement of Commissioner J. Thomas Rosch Regarding Proposed Revisions to the Part 2 Rules and Rule 4.1(e) (Jan. 13, 2012), *available at* http://www.ftc.gov/os/2012/01/120113part2and4statement.pdf.