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The Threshold

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Letter From the Chair

To all Committee Members:

Welcome to the Spring Issue of The Threshold.

As we publish this issue on the eve of the 53rd Annual Spring Meeting, we bring several insightful articles on recent merger developments. We top it off with an interview with FTC Commissioner Jon Leibowitz. Commissioner Leibowitz was confirmed and sworn in as Commissioner last September, and, we are proud to say, this is his first interview with a Section Committee Newsletter. Check it out to gain some insight on the new Commissioner's views on merger enforcement and antitrust enforcement generally. We then have several articles relating to recent merger developments: Seth Sacher explores various issues relevant to the analysis in a number of recent casino mergers; Elizabeth Bailey provides her perspective on the recent debate over the measuring of competitive effects in recent mergers in the oil industry and what that debate teaches about the importance of assumptions in econometric analysis generally; Jeff Leon provides some lesson-learned tips on litigating consummated merger cases in the wake of the Chicago Bridge case; and Marian Bruno and Mike Verne provide a glimpse into some of the issues raised by the FTC's recent changes in the HSR Rules governing non-corporate entities.

As you make your plans for attending the Spring Meeting, remember that the Mergers & Acquisitions Committee is sponsoring several exciting programs:

- Wednesday at 3:45 pm: *Coordinated Effects Theories for Mergers—Recent Experience and Beyond* (this program will explore the evolution of competitive effects analysis during the Bush Administration and where it may be going in the future);

Chicago Bridge: Lessons from Litigating a Consummated Merger in a FTC Part III Proceeding

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The Federal Trade Commission's decision early this year in Chicago Bridge[1] was the latest entry in a saga that is entering its fifth year. The Chicago Bridge case began with an Hart-Scott-Rodino ("HSR") filing in September 2000 related to a letter of intent for Chicago Bridge to purchase Pitt-Des Moines, Inc. ("PDM"). Both Chicago Bridge and PDM were involved in the engineering and construction of large, field-erected, storage tanks for water, chemicals, fuels and gasses. The mandatory waiting period came and went with no word from the FTC or DOJ. Unfortunately, because of business issues, the parties were unable to close the transaction following expiration of the waiting period.

The FTC began making preliminary inquiries about the transaction in early November 2000. The transaction closed in February 2001 and, at the end of October 2001, the FTC filed its complaint challenging the transaction in four product markets that constituted a small part of the businesses of both Chicago Bridge and PDM: field-erected Liquified Natural Gas ("LNG") storage tanks, Liquified Petroleum Gas ("LPG") storage tanks, Liquified Nitrogen/Liquified Oxygen ("LIN/LOX") storage tanks and Thermal Vacuum Chambers ("TVCs") used in the testing of satellites. The matter was tried in a Part III proceeding[2] before an FTC administrative law judge from November 2002-January 2003. The ALJ issued an opinion finding the transaction unlawful in the summer of 2003. Chicago Bridge appealed to the full Commission, and that appeal was heard in early November 2003. Chicago Bridge is now appealing the Commission's decision—which requires CB&I to divide itself into two separate companies and sell one of the newly created entities—to the Fifth Circuit. A decision there probably will not come for another year or more.

There are a number of lessons for practitioners in the Chicago Bridge case, some of which are obvious from the text of the FTC's opinion, and some of which come from the Part III process. I have set forth some of these lessons in the form of a top ten list, with apologies in advance to David Letterman. The following are in no particular order:

[1] In the Matter of Chicago Bridge & Iron, N.V., FTC Docket No. 9300 (Jan. 6, 2005) (Commission Opinion), available at http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf.

[2] See FTC Rules of Practice in Adjudication Proceedings, 16 C.F.R. Part 3.

(1) There Is No Statutory Timeline for Investigations Initiated after the Expiration of the HSR Waiting Period. As practitioners, we are all aware of the formal deadlines established by the HSR Act for review of submitted mergers and acquisitions. However, those deadlines only apply if the reviewing agency takes action before the expiration of the initial 30-day waiting period. Since the FTC inquiry began after the waiting period expired, the FTC was not statutorily obligated to complete its investigation in any specific time period. Indeed, while FTC staff repeatedly sought assurances that Chicago Bridge would not close its PDM transaction within a specified period, FTC staff refused to give any commitment as to when it would complete its investigation. In fact, it took nearly a year for the investigation to be completed, and Chicago Bridge was powerless to do anything to force an earlier resolution.

(2) The FTC Will Challenge Consummated Mergers. The current FTC has made it clear that it will challenge consummated mergers in its administrative court through a Part III proceeding, having done so in Chicago Bridge, MSC.Software,[3] Aspentech,[4] and Evanston Northwestern Healthcare.[5] Practitioners need to be aware of this in advising their clients. The willingness of the DOJ to challenge consummated mergers is less clear, as the FTC's challenges are facilitated by the existence of the Part III procedure.

(3) FTC Part III Trials Are Now on a Fast Track. Most of us who grew up as lawyers reading old FTC opinions saw that merger challenges in the FTC frequently took several years to come to trial. That is no longer the case as the FTC's Rules of Practice have been amended to require that all Part III proceedings be decided by the ALJ within one year of the filing of the complaint.[6] Given the structure of the one-year rule, the trial actually must begin within six months of the filing of the complaint as the one-year rule requires that the matter be decided and the opinion written within one year of the filing of the complaint. Since the FTC Rules of Practice give ALJs 90 days to issue an opinion, the one-year rule really means that the trial must be completed within nine months of the filing of the complaint. And given that consummated merger trials take 2-3 months to complete, the ALJ must start the trial within six to seven months of the complaint filing to ensure compliance. Good cause extensions are possible, but are not freely given by either of the current ALJs. It is difficult to bring any case to trial within six months of the filing of the complaint, and particularly so in a complex matter such as a trial of a consummated merger. Compounding the difficulty is the fact that the FTC staff have had relatively unbridled subpoena power during their investigation, and can make use of all that material in the Part III proceeding. A party such as Chicago Bridge does not receive subpoena power until the complaint is filed. It is thus imperative to begin to subpoena third-parties immediately upon service of the complaint.

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[3] In The Matter of MSC.Software Corp., FTC Docket No. 9299.

[4] In The Matter of Aspen Technology, Inc., FTC Docket No. 9310.

[5] In The Matter of Evanston Northwestern Healthcare Corp., FTC Docket No. 9315.

[6] See 16 C.F.R. § 3.51(a).

(4) FTC "Investigational Hearings" of Party Witnesses Are Likely Admissible in Their Entirety. During investigations, staff can subpoena witnesses to appear for a deposition known as an "investigational hearing" ("IH"). These hearings are ex parte for third-parties. In the case of IHs of employees of parties under investigation, FTC Rules of Practice prescribe that the party lawyer representing the witness must remain silent—other than to assert the two permissable objections—until the end of the IH, at which time additional questions can be propounded to the witness.[7] Despite the limited role of a parties' lawyer at an IH, IH transcripts are admissible in their entirety at a Part III proceeding as admissions of the party. Practitioners thus must be aggressive in protecting their clients during IHs, despite the rules demanding silence.

(5) The Rules of Evidence Do Not Apply in FTC Part III Proceedings. Going into an FTC Part III proceeding, a practitioner should know that the rules of evidence as we know them do not apply always in Part III matters.[8] The most obvious difference is the treatment of hearsay, which is considered admissible unless it can be shown to be unreliable. Thus, in discovery, it is important to attack the reliability of hearsay that comes out during testimony.

(6) Because of De Novo Review, Parties Must Try their Case to the Commission. Commission rules call for de novo review of an ALJ's initial decision and order.[9] This means that the Commissioners and their attorney advisers may review the record in its entirety without any required deference to the ALJ's findings and conclusions. De novo review has implications for the practitioner, who must ensure that the record will be complete when the Commission reviews it. Thus, offers of proof must be made on all evidentiary rulings and cross-examinations may need to be more complete than otherwise would be required to establish certain points to a judge sitting in the courtroom observing witness demeanor.

(7) HHIs Still Matter. Much has been written about the significance that should be placed on HHIs. The markets in which Chicago Bridge and PDM competed were extremely sporadic, so staff calculated HHI's going back ten years. The ALJ rejected the meaningfulness of HHIs, finding that calculating HHIs over such a long period made the HHI results subject to manipulation since only going back four years produced a zero change in the HHI in three of the four markets. The Commission's opinion contained an extensive justification of the significance of HHIs, even in such sporadic markets.[10] Thus, HHIs remain a critical first step under the Horizontal Merger Guidelines.[11]

(8) No Product Market Is Too Small To Challenge. The FTC's complaint asserted that Chicago Bridge's acquisition of

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[7] See 16 C.F.R. § 2.9. The rule limits objections to only two grounds: that a question is outside the scope of the investigation or that the requested information is privileged.

[8] See 16 C.F.R § 3.43(b).

[9] See 16 C.F.R. § 3.54.

[10] See In the Matter of Chicago Bridge & Iron, N.V., FTC Docket No. 9300, at 17-19 (Jan. 6, 2005) (Commission Opinion), available at http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf.

[11] See U.S. Dept. of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1.5 (1992).

PDM would give it market power in TVCs even though a TVC had not been constructed in the US in more than ten years, and even though Chicago Bridge had not itself constructed a TVC since 1984. Practitioners need to be aware of this in counseling clients on prospective transactions.

(9) Parties Must Protect the Virtue of Their Competitors. In assessing the competitive effects of a merger and the likely success of entry, it is essential to develop evidence regarding the capabilities of existing firms and likely entrants. In Chicago Bridge, staff set out to establish that existing market participants and likely supply-side entrants were less than competent and not trusted by the marketplace. During depositions, customers were asked if they were aware that Customer X had a problem with Company Y in performing a prior project. Of course, such questions are likely to cause the deponent to go back and talk to Company X to find out what Company Y did wrong, and thereby obtain knowledge that ultimately could influence the deponent's testimony at trial. Dealing with such questions is a delicate balancing act. Rather than finding out what witnesses know, staff can succeed in disseminating information than can influence a customer's testimony. We had several battles with staff over such questions, and practitioners must be vigilant when such questions are being asked. This type of approach by staff also can put practitioners in the uncomfortable position of trying to demonstrate that their own clients are not perfect and have their own share of mistakes and missteps.

(10) The FTC Will Not Put on Remedy Evidence. Despite the fact that FTC staff sought to break-up a company more than two years after its merger had been integrated into existing operations, staff did not put on a single witness testifying to the feasibility or competitive impact of such a remedy. Remedy ramifications need to be a focus in discovery by the parties in a consummated merger challenge.

Last Words

Substantively, there are many more lessons to be learned from Chicago Bridge, far too many to discuss in this format. Practitioners can expect the appeal to clarify the law regarding at least two critical issues in merger law: what the government's burden is in showing that entry that has occurred will be insufficient to restore pre-merger conditions; and what the government's burden is in showing that its proposed remedy will not harm competition and will achieve its remedial objectives. In short, the last words on Chicago Bridge have not been written yet.