

## VIII. *Investigating Consummated Mergers: The Antitrust Agencies' Shift Toward a Retroactive Enforcement Policy*

### A. Introduction

In the last decade, the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) (together, “the agencies”) have increasingly challenged consummated mergers.<sup>1</sup> This development marks a stark departure from longstanding practices of antitrust law, which historically have militated against a retroactive approach to enforcement.<sup>2</sup> In fact, Congress enacted the Hart-Scott-Rodino Act of 1976 (“the HSR Act”)<sup>3</sup> to make it easier for the agencies to focus on pre-merger clearance.<sup>4</sup> Since the Hart-Scott-Rodino (“HSR”) filing threshold increased in 2001, however, the FTC and DOJ have enhanced their focus on consummated mergers, which comprise an increasing number of the agencies’ merger challenges.<sup>5</sup> These investigations most often impact mergers too small to qualify for pre-merger screening, but also include mergers that initially cleared the HSR process.<sup>6</sup>

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<sup>1</sup> J. Thomas Rosch, Comm’r, F.T.C., Remarks at the ABA Section of Antitrust Law Spring Meeting: Consummated Merger Challenges—The Past is Never Dead (Mar. 29, 2012), at 2 [hereinafter Rosch Speech], available at <http://www.ftc.gov/speeches/rosch/120329springmeetingspeech.pdf>.

<sup>2</sup> Scott A. Sher, *Closed but Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 41, 54 (2004).

<sup>3</sup> Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended in scattered sections of 15, 18, 28 U.S.C.).

<sup>4</sup> Sher, *supra* note 2, at 54.

<sup>5</sup> *M&A Antitrust Surprise: FTC Challenges \$15 Million Merger Consummated in 2007*, AKIN GUMP STRAUSS HAUER & FELD ANTITRUST ALERT (Oct. 22, 2012), <http://www.akingump.com/files/Publication/4464a7f8-166f-49a8-9258-dae18b4777ae/Presentation/PublicationAttachment/eb8519c0-2407-4ce7-843c-977a70e5973e/121022MAAntitrustSupriseFTCChallenges.pdf> [hereinafter AKIN GUMP].

<sup>6</sup> Lisa Jose Fales, Robert P. Davis & Elizabeth K. Lowe, *Consummated Mergers: It Ain’t Over ‘Til the Fat Lady Sings*, VENABLE LLP ANTITRUST ALERT (Aug. 2, 2012), <http://www.venable.com/consummated-mergers-it-aint-over-til-the-fat-lady-sings-08-02-2012>; Barry Nigro, Peter Guryan & Richard Park, *Dep’t of Justice Challenges Consummated \$5M Merger*, FRIED FRANK ANTITRUST & COMPETITION LAW ALERT (Mar. 18, 2010),

While post-merger challenges give the antitrust agencies a valuable enforcement tool, they also present substantial hardships to companies.<sup>7</sup> Post-merger challenges are likely to result in prolonged litigation, place companies at a disadvantage in litigation by allowing the agencies to compile evidence of anticompetitive effects, freeze companies' abilities to conduct business plans, and often result in prolonged and ultimately inefficient divestiture proceedings.<sup>8</sup>

The Eleventh Circuit's recent decision in *Polypore International, Inc. v. Federal Trade Commission*<sup>9</sup> affirms the agencies' broad discretion over remedies, reinforces the agencies' focus on consummated mergers, and lends judicial approval to the upswing in post-merger challenges over the last decade.<sup>10</sup> In light of this decision, it is worth exploring the agencies' focus on consummated mergers and the impact of this shift on the legal and business communities. Part B of this article will discuss the historical trend toward pre-merger clearance, Part C will address the agencies' recent trend toward post-merger clearance, Part D will discuss *Polypore*, and Part E will discuss the impact of consummated merger challenges on markets and companies.

## **B. Overview of Antitrust Law and the Historical Trend Toward Pre-Merger Clearance**

Section 7 of the Clayton Act<sup>11</sup> gives the FTC and the DOJ the power to investigate and enforce antitrust laws even after consummated mergers when such transactions diminish

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<http://friedfrank.com/siteFiles/Publications/7196A35CFBEE3ADF9DF0E2E1BD5A83C4.pdf>; Scott Sher, *Undoing Done Deals: The Chicago Bridge Decision*, DEALLAWYERS.COM (Jan. 19, 2005, 1:49 PM), <http://www.deallawyers.com/Blog/2005/01/undoing-done-deals-the-chicago-bridge-decision.html> [hereinafter *Undoing Done Deals*].

<sup>7</sup> Rosch Speech, *supra* note 1, at 19–20; *Undoing Done Deals*, *supra* note 6.

<sup>8</sup> Rosch Speech, *supra* note 1, at 19–20; *Undoing Done Deals*, *supra* note 6.

<sup>9</sup> 686 F.3d 1208, 1219 (11th Cir. 2012).

<sup>10</sup> Fales, Davis & Lowe, *supra* note 6; Bruce D. Sokler & Helen J. Kim, *Eleventh Circuit Upholds FTC's Merger Ruling and Divestiture Order*, MINTZ LEVIN ANTITRUST ADVISORY (July 16, 2012), <http://www.mintz.com/newsletter/2012/Advisories/2077-0712-NAT-AFR/index.html>.

<sup>11</sup> Clayton Act §7, 15 U.S.C. §18 (2006).

competition.<sup>12</sup> Historically, however, post-merger investigations have been deemed unwise. Congress enacted the HSR Act, which established pre-merger filing requirements, in part to “eliminate the deleterious effects of post-consummation challenges.”<sup>13</sup> “According to the House of Representatives [during the HSR Act’s passage], substantial costs accompany post-close review ‘to the firms, the courts, and the marketplace . . . [m]erger litigation simply need not always continue for years and even decades—but if it takes place after consummation, it generally will . . . .’”<sup>14</sup>

The HSR Act requires companies to notify the antitrust agencies of an anticipated merger and provides the agencies with sufficient time to challenge the merger prior to consummation.<sup>15</sup> Before these requirements took effect, merging firms inadequately addressed anticompetitive problems, forcing the agencies to “unscramble the eggs” after the merger was consummated.<sup>16</sup>

While the HSR Act largely diminished the number of post-merger investigations, it did not eliminate all post-merger review.<sup>17</sup> The HSR Act only targets mergers over a certain size, allowing smaller yet potentially anticompetitive mergers to escape the agencies’ attention.<sup>18</sup> The agencies may later target these mergers, as well as larger mergers previously cleared through the HSR review process, long after consummation.<sup>19</sup> The agencies have recently increased their focus on these types of investigations, potentially undermining the historical trend toward pre-merger clearance.<sup>20</sup>

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<sup>12</sup> Sher, *supra* note 2, at 41 (stating the agencies can police consummated mergers “where they can demonstrate that a transaction may substantially lessen competition.”).

<sup>13</sup> *Id.* at 54; Jessica Strock, Note, *Setting the Terms of a Break-Up: The Convergence of Federal Merger Remedy Policies*, 53 WM. & MARY L. REV. 2147, 2156 (2012).

<sup>14</sup> Sher, *supra* note 2, at 54 (citing H.R. REP. NO. 94-1373, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2637).

<sup>15</sup> Strock, *supra* note 13, at 2156.

<sup>16</sup> *Id.*

<sup>17</sup> Sher, *supra* note 2, at 41, 54.

<sup>18</sup> *Id.* at 54.

<sup>19</sup> *Id.* at 55 (“[I]n the wake of higher reporting thresholds, post-consummation merger challenges are likely to increase in number and significance.”); AKIN GUMP, *supra* note 5.

<sup>20</sup> Sher, *supra* note 2, at 92 (discussing the FTC’s “recent focus on reviewing and challenging closed transactions”).

### C. Overview of the Agencies' Recent Trend Toward Post-Merger Challenges

In 2001, the HSR Act's premerger filing thresholds "substantially increased" from \$15 million to \$50 million, reducing the number of premerger notifications received by the FTC and DOJ.<sup>21</sup> This resulted in a significant increase in post-merger challenges because the agencies could only evaluate these mergers retroactively.<sup>22</sup> FTC Commissioner J. Thomas Rosch addressed this trend at the ABA Section of Antitrust Law Spring Meeting in March, stating that "[c]onsummated merger investigations have in recent years become an increasingly important part of the FTC's caseload."<sup>23</sup> The agencies have challenged over thirty consummated mergers since the threshold increased in 2001 and "about half" of this total since 2009.<sup>24</sup> Consummated merger challenges comprise approximately one-fifth of the FTC's total merger challenges.<sup>25</sup>

The Obama Administration's aggressive antitrust policies and the economic downturn have also contributed to this shift.<sup>26</sup> Because fewer HSR-reportable mergers are taking place after the economic downturn, the agencies can instead focus their attention and resources on consummated mergers.<sup>27</sup>

Consummated merger challenges come in all shapes and sizes. The upswing in post-merger investigations includes mergers small and large, eligible and ineligible for HSR notification. In 2010, the DOJ challenged Election Systems & Software Inc.'s \$5 million acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc.<sup>28</sup> More recently, on October 12, 2012, the FTC challenged Magnesium Elektron North America, Inc.'s 2007 \$15 million

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<sup>21</sup> Rosch Speech, *supra* note 1, at 2; AKIN GUMP, *supra* note 5.

<sup>22</sup> AKIN GUMP, *supra* note 5.

<sup>23</sup> Rosch speech, *supra* note 1, at 1.

<sup>24</sup> AKIN GUMP, *supra* note 5.

<sup>25</sup> Rosch speech, *supra* note 1, at 1.

<sup>26</sup> Carl W. Hittinger & Lesli C. Esposito, *Non-Reportable Transactions No Longer Safe From Antitrust Scrutiny*, 242 LEGAL INTELLIGENCER 22 (2010); Jenna Greene, *In Antitrust Blitz, FTC Targets Consummated Mergers*, LAW.COM (July 26, 2010), [http://www.law.com/jsp/article.jsp?id=1202463869963&In\\_Antitrust\\_Blitz\\_FTC\\_Targets\\_Consummated\\_Mergers&slreturn=20120823214937](http://www.law.com/jsp/article.jsp?id=1202463869963&In_Antitrust_Blitz_FTC_Targets_Consummated_Mergers&slreturn=20120823214937).

<sup>27</sup> Greene, *supra* note 26; Hittinger & Esposito, *supra* note 26.

<sup>28</sup> Fales, Davis & Lowe, *supra* note 6; Nigro, Guryan & Park, *supra* note 6.

acquisition of Revere Graphics Worldwide, Inc.<sup>29</sup> These mergers fell significantly below the HSR threshold and their challenges highlight the agencies' willingness to pursue consummated mergers of all sizes.<sup>30</sup>

Consummated merger challenges can even include larger deals that the agencies previously approved during the HSR process. The FTC's unwinding of the merger between Chicago Bridge & Iron, Inc. and Pitt-Des Moines, Inc., four years after its consummation, is illustrative.<sup>31</sup> Despite having previously cleared this merger, the FTC later opened another investigation and required the deal to be unwound.<sup>32</sup> In a decision upheld by the Fifth Circuit, the FTC required Chicago Bridge to create and then divest a division capable of competing independently within six months.<sup>33</sup>

The "number and variety of mergers under fire" indicate the agencies' shift in focus toward consummated mergers.<sup>34</sup> The Eleventh Circuit recently underscored this shift in *Polypore*.<sup>35</sup>

#### **D. The Eleventh Circuit's Recent Decision in *Polypore* Reinforced the Agencies' Trend Toward Post-Merger Challenges**

This year, the Eleventh Circuit validated the agencies' shift toward challenging consummated mergers in *Polypore*.<sup>36</sup> Polypore and Microporous, both producers of battery separators, merged in February 2008.<sup>37</sup> In September 2008, the FTC issued an administrative complaint alleging anticompetitive effects.<sup>38</sup> After a four-week hearing, an administrative law judge affirmed and ordered divestiture of all acquired assets, including an Austrian plant located outside of the relevant U.S. market.<sup>39</sup>

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<sup>29</sup> AKIN GUMP, *supra* note 5.

<sup>30</sup> Nigro, Guryan & Park *supra* note 6; AKIN GUMP, *supra* note 5.

<sup>31</sup> *Undoing Done Deals*, *supra* note 6; Fales, Davis & Lowe, *supra* note 6.

<sup>32</sup> *Undoing Done Deals*, *supra* note 6; Fales, Davis & Lowe, *supra* note 6.

<sup>33</sup> Fales, Davis & Lowe, *supra* note 6.

<sup>34</sup> Greene, *supra* note 26.

<sup>35</sup> *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1216–19 (11th Cir. 2012).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1210–1211.

<sup>38</sup> *Id.* at 1212.

<sup>39</sup> *Id.* at 1212–13; Fales, Davis & Lowe, *supra* note 6.

The Eleventh Circuit held that Polypore and Microporous should be viewed as actual competitors rather than potential competitors, thus treating the acquisition as a horizontal merger and imposing a presumption of liability.<sup>40</sup> However, the Court did not cite or discuss the Horizontal Merger Guidelines and relied instead on Supreme Court precedent that predated the Guidelines, expanding the situations in which a potential competitor “can be considered an actual competitor” and thus appropriate for a presumption of liability.<sup>41</sup> It further upheld the divestiture of the Austrian plant to ensure that another divested plant would have sufficient capacity to service the American market.<sup>42</sup>

*Polypore* “reinforce[d] the [FTC’s] aggressive merger policy” and stands as a ringing judicial endorsement of the agencies’ focus on consummated mergers and their broad divestiture powers.<sup>43</sup> It underscored the risk that the FTC or DOJ could challenge a merger even after the merged company has made “substantial investments of time, money and other valuable resources” and demonstrates the agencies’ broad discretion in crafting remedies to anticompetitive mergers.<sup>44</sup> In light of this decision and the continued investigations it authorizes, it is worth exploring the impact of consummated merger challenges on the legal and business communities.

### E. The Impact of Consummated Merger Challenges

While consummated merger challenges prove a useful tool in the agencies’ enforcement of antitrust laws, they may significantly burden the companies that come under their focus.<sup>45</sup> The agencies’ shift has caused an increase in litigation, led to uncertainty among companies and markets, and resulted in increased divestiture

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<sup>40</sup> *Polypore*, 686 F.3d at 1215–16.

<sup>41</sup> Sokler & Kim, *supra* note 10 (explaining how the Court endorsed the FTC’s enforcement policy and stating the Court “never cite[d] to or present[ed] discussion of the Horizontal Merger Guidelines . . . Instead, it use[d] Supreme Court precedent that predates the issuance of the Guidelines.”).

<sup>42</sup> *Polypore*, 686 F.3d at 1219.

<sup>43</sup> Sokler & Kim, *supra* note 10.

<sup>44</sup> Fales, Davis & Lowe *supra* note 6; Sokler & Kim, *supra* note 10.

<sup>45</sup> Rosch speech, *supra* note 1, at 2, 19–21; Sher, *supra* note 2, at 53–54; *Undoing Done Deals*, *supra* note 6.

proceedings in which the agencies attempt to “unscramble the eggs” sometimes years after a new company has come into fruition.<sup>46</sup>

### 1. Increase in Litigation

The agencies’ shift has sparked a significant increase in the rate of merger challenges that result in litigation. Post-close investigations are “far more likely” to result in litigation (as opposed to consent decrees) than pre-consummation challenges.<sup>47</sup> Between March of 2009 and March of 2012, four out of nine consummated merger challenges resulted in litigation, as compared with only six of thirty-nine unconsummated merger challenges during the same time period.<sup>48</sup>

Both sides appear more eager to litigate challenges to consummated mergers. When presented with post-merger challenges, companies are incentivized 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 unconsummated transaction.”<sup>49</sup> For the government, it is easier to collect evidence in a post-merger challenge “because there is less need to predict or speculate; one can determine what actually happened post-merger.”<sup>50</sup> In fact, law firms representing challenged companies have identified consummated mergers as “low-hanging fruit” for the agencies because of the availability, post-merger, of incriminating evidence of anti-competitive conduct.<sup>51</sup>

The 2010 Merger Guidelines, which discussed consummated mergers for the first time, made post-merger litigation an attractive choice for the agencies by providing them with further evidentiary

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<sup>46</sup> Rosch speech, *supra* note 1, at 2; Sher *supra* note 2, at 47; *Undoing Done Deals*, *supra* note 6.

<sup>47</sup> Rosch speech, *supra* note 1, at 2.

<sup>48</sup> *Id.*

<sup>49</sup> Lauren S. Albert & Aryeh Friedman, *Non-Reportable Smaller Deals May Present Greater Risks, Costs Than Big-Ticket Deals That Must Be Reported to FTC, DOJ*, 18 CORP. COUNSEL WEEKLY (BNA) 279 (Sept. 10, 2003) (discussing how companies will pay staggering legal fees to defend against agency investigations and how, in one instance, a company spent in legal fees over half the amount spent on the acquisition itself. These exorbitant fees eventually led the company to settle.); Rosch speech, *supra* note 1, at 2–3.

<sup>50</sup> Rosch speech, *supra* note 1, at 3; Fales, Davis & Lowe, *supra* note 6.

<sup>51</sup> Fales, Davis & Lowe, *supra* note 6.

advantages.<sup>52</sup> Rather than leaving the agencies to draw inferences from market definition and concentration, as they would have to do in pre-merger reviews, the Guidelines allow the agencies to focus on concrete “[e]vidence of observed post-merger price increases or other changes adverse to customers.”<sup>53</sup> Such evidence “is given substantial weight” and “can be dispositive.”<sup>54</sup> Armed with such evidence, “the agencies often have little trouble proving that a deal has had an anticompetitive effect.”<sup>55</sup>

## 2. **Impact of consummated merger challenges on companies and markets**

The perpetual threat of a merger challenge can have significant adverse effects on companies and markets. Post-close challenges “paralyze markets” because they threaten to strip companies of acquired assets and of “years of independent product development that they would have engaged in but for the futile attempt to acquire a competitor.”<sup>56</sup> Further, even if divestiture does return a company to the position it was in before the merger, the company would be at a disadvantage compared to competitors who have “moved on and continued to develop next-generation products during that time.”<sup>57</sup> “[L]ost opportunities could be considerable.”<sup>58</sup>

Additionally, the FTC has acknowledged that post-merger reviews often take too long.<sup>59</sup> Commissioner Rosch admitted that this is the primary complaint about challenges to consummated mergers.<sup>60</sup> In HSR investigations, agency staff is incentivized to investigate and make enforcement recommendations within a relatively short time period.<sup>61</sup> Such incentives are absent in post-merger reviews. There is “no hard deadline” and the “staff’s incentive is to turn over every nook and cranny in the investigation to

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<sup>52</sup> Rosch speech, *supra* note 1, at 9; Fales, Davis & Lowe, *supra* note 6.

<sup>53</sup> Rosch speech, *supra* note 1, at 10 (citing 2010 Merger Guidelines).

<sup>54</sup> *Id.*

<sup>55</sup> Fales, Davis & Lowe, *supra* note 6.

<sup>56</sup> *Undoing Done Deals*, *supra* note 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Rosch speech, *supra* note 1, at 19.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



minimize the risk of a surprise down the road.”<sup>62</sup> Rosch estimated that post-merger investigations “take on average twice as long to complete as investigations of unconsummated mergers.”<sup>63</sup>

Even if justifiable, these delays pose several problems for companies, consumers, and markets. These delays exacerbate the problem of “unscrambling the eggs” because unwinding anticompetitive mergers becomes more difficult as time passes and as the assets become more intertwined.<sup>64</sup> Prolonged investigations also lead to uncertainty among the target’s vendors, customers, and employees, all of whom may abandon the company for fear of divestiture, and may cause the target itself to “pull[] some of its competitive punches in the marketplace,” undermining the agencies’ goal of defeating anti-competitive effects.<sup>65</sup> Lengthy investigations may also impose “significant financial and manpower burdens” on third parties subject to compulsory process.<sup>66</sup>

### 3. The potential futility of remedies

Even if the agencies successfully challenge a consummated merger, their preferred remedies may ultimately prove ineffective. The FTC prefers structural remedies over conduct remedies for violations because “[a] divestiture remedy is more likely to restore competition than a conduct remedy and does not entail long-term monitoring of the respondent.”<sup>67</sup> Divestiture is the “standard remedy” in consummated merger challenges, and *Polypore* has affirmed the FTC’s broad discretion over the scope of the divestiture.<sup>68</sup>

The agencies’ difficulty unwinding mergers through divestiture, however, was part of what led to the HSR Act’s

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<sup>62</sup> Hittinger & Esposito, *supra* note 26; Rosch speech, *supra* note 1, at 19.

<sup>63</sup> Rosch speech, *supra* note 1, at 20.

<sup>64</sup> Hittinger & Esposito, *supra* note 26 (stating, “Determining which assets need to be sold in order to resolve the issue can be complicated, difficult and sometimes impossible once the assets are integrated.”); Rosch speech, *supra* note 1, at 20.

<sup>65</sup> Rosch speech, *supra* note 1, at 20.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 15; Strock, *supra* note 13, at 2152 (stating the agencies favor divestiture over conduct-based remedies because they are more effective and require less monitoring than conduct-based remedies).

<sup>68</sup> *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208, 1218–19 (11th Cir. 2012); Rosch speech, *supra* note 1, at 19; Strock, *supra* note 13, at 2152.

passage.<sup>69</sup> After mergers, the target's assets, technology, and personnel are either replaced or combined with those of the acquiring firm, and "it becomes nearly impossible to unwind the transaction and restore the 'acquired firm to its former status as an independent competitor.'"<sup>70</sup> Further, the government cannot always identify a "suitable buyer" and acquiring firms sometimes "purposely stall the investigation and trial, while wasting the acquired party's assets and making the latter unattractive to any buyer."<sup>71</sup> Divestiture proceedings may then ultimately prove ineffective. At the very least, such concerns raise questions about post-merger challenges' effectiveness and their burdensome effects on businesses.

#### F. Conclusion

The Eleventh Circuit's decision in *Polypore* reinforced the antitrust agencies' shift toward challenging consummated mergers and underscored their broad discretion to craft remedies to violations. Armed with more developed evidence than is available for pre-merger reviews, the agencies may be better equipped than ever to enforce the country's antitrust laws. The burden placed on companies, consumers, and markets, however, is a cost worth considering.

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<sup>69</sup> Sher, *supra* note 2, at 54.

<sup>70</sup> Hittinger & Esposito, *supra* note 26; Sher, *supra* note 2, at 53–54 (citing H.R. REP NO. 94-1373, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2637, 2641).

<sup>71</sup> Sher, *supra* note 2, at 54.

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