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Preliminary Injunction Denied in FTC's Challenge to LabCorp's Acquisition of Rival

Jeffrey May (Wolters Kluwer) · Wednesday, March 2nd, 2011

The FTC has suffered a setback in its challenge to Laboratory Corporation of America's acquisition of Westcliff Medical Laboratories, Inc. The federal district court in Santa Ana, California, on February 22 denied the agency's request for a preliminary injunction to prevent integration of the firms pending the outcome of an administrative trial challenging the transaction. Three days later, the court denied the agency's request for an injunction pending an appeal to the U.S. Court of Appeals in San Francisco. An administrative trial is set to commence in May 2011.

The clinical laboratory company's acquisition of its smaller rival, which was completed in June 2010, was not reported under the Hart-Scott-Rodino Antitrust Improvements Act. When the FTC learned of the transaction, staff opened an investigation. LabCorp agreed to hold the Westcliff assets separate for a few months while the agency looked into the deal. As that agreement was about to expire, the FTC issued an [administrative complaint](#) on November 30, 2010. The FTC also sought a temporary restraining order and preliminary injunctive relief under Sec. 13(b) of the FTC Act.

Sec. 13(b) of the FTC Act imposes a two-part "public interest" standard to determine whether a preliminary injunction should be granted, according to the court. The standard requires: (1) a determination of the likelihood that the Commission will ultimately succeed on the merits; and (2) a balancing of the equities. The court explained that the equities will often weigh in favor of the FTC and that the "public interest" standard is less stringent than the traditional four part test for preliminary injunctive relief that applies to suits brought by private parties.

In any event, the relief was denied. The FTC failed to demonstrate a likelihood of success on the merits. It failed to establish its prima facie case. Even assuming a prima facie case, the merging firms presented sufficient rebuttal evidence, particularly about new entrants. Moreover, the balancing of the equities strongly favored the merging firms, in the court's view.

Relevant Market

The court questioned the FTC's proposed relevant markets for analyzing the anticompetitive effects of the transaction. Market shares had to be measured in a proper relevant product and geographic market, the court cautioned. The court also pointed to Commissioner J. Thomas Rosch's [statement](#) dissenting from the decision to issue the complaint in part based on the complaint's proposed capitated-only market.

The agency alleged that the relevant product market was “the sale of capitated clinical laboratory testing service . . . to physician groups” and alternatively the sale of clinical laboratory testing services to physician groups operating under the delegated managed care model. However, the services provided by clinical labs are identical regardless of whether they are priced either on a fee-for-service (FFS) or a capitated basis. The court noted that expanding the defined product market to include FFS contracts with independent practice associations or independent physician associations dramatically expanded the number of competitors in the market and reduced the merging firms’ market shares.

The largest independent clinical laboratory in California is Quest Diagnostics Incorporated. When the FTC challenged Quest’s acquisition of Unilab Corporation in 2003, it alleged that the relevant market for examining the transaction was the sale of laboratory testing services to physicians groups in Northern California, it was noted.

The FTC’s proposed geographic market—spanning all of “Southern California”—was also questioned. The court pointed out that the merging firms provided clinical lab services throughout California. A geographic market including Northern and Southern California would have reduced the companies’ combined market shares because other prominent competitors existed in “Northern California.”

Balancing of Equities

Among the factors taken into account in balancing the equities of granting or denying the relief sought was the length of time between the preliminary proceedings and a final decision on the merits. The court suggested that the earliest the FTC would likely decide the administrative case would be in early 2012 based on the current schedule and the FTC’s Rules of Practice. It noted that each of the FTC’s post-consummation merger challenges over the past ten years has lasted at least two years and one lasted over seven years.

Order Denying Injunction Pending Appeal

In its February 25 order, the court explained that its decision to deny the injunction was based in part on the potential harm to LabWest (formerly Westcliff). It also noted that it was not convinced that the difficulties of divesting the acquired assets in the event that the FTC ultimately prevailed outweighed the risk of the injunction.

The February 22, 2011, decision in *FTC v. Laboratory Corporation of America, et al.*, C.D. Cal., No. SACV 10-1873 AG, appears at [2011-1 Trade Cases ¶77,348](#).

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