# CLIENT ALERT

## DOJ Challenges Consummated Merger and Seeks Divestiture

**Sep.27.2017**

On September 26, 2017, the Department of Justice filed its first merger challenge of the Trump Administration. In the suit, DOJ asserts that Parker-Hannifin Corporation's $4.3 billion acquisition of CLARCOR Inc. – which was completed in February 2017 – was essentially a merger to monopoly in U.S. markets for aviation fuel filtration products. The transaction is large enough to have been reported under the Hart-Scott-Rodino (HSR) Act, raising the question why this competitive issue was not addressed during the waiting period.

The complaint, filed in federal court in Delaware, alleges that Parker-Hannifin and CLARCOR were the only U.S. suppliers of aviation fuel filtration systems and filtration elements qualified by the Energy Institute. Since "U.S. airlines and the U.S. military have adopted standards" requiring suppliers to use qualified filtration products, another qualified supplier of fuel filtration products is not a viable competitor" because it is located in Germany and lacks U.S. production and other capabilities. As a result, DOJ alleges, the deal "has effectively created a monopoly in these critical safety products."

Such a challenge to a consummated merger with an allegedly straightforward horizontal overlap is not uncommon, and has been cited frequently over the last decade by the U.S. antitrust agencies as an important enforcement tool. The Parker-Hannifin complaint *is* unusual, however, because:

- Unlike many consummated merger challenges (*e.g.* Bazaarvoice/PowerReviews), the $4.3 billion deal was reportable under the HSR Act.
- The deal reportedly did not draw a "second request" for information from DOJ, which would mean it cleared in 30 days.
- The DOJ has not so far alleged violations of the HSR Act, which means there is not yet any suggestion that the parties' HSR Act filings and Item 4 document productions were incomplete.
- Parker-Hannifin appears to have rejected settlement of DOJ's allegations via a divestiture, even though the parties' combined fuel filtration business represents a tiny part of the overall deal value (~$20 million out of $4.3 billion).

DOJ's complaint and press release strongly suggest that the agency believes it was misled by Parker-Hannifin. DOJ alleges that "Parker-Hannifin was aware that it was acquiring its only U.S. competitor for these important aviation fuel filtration products." To support this allegation, the agency cites an email from Parker-Hannifin's Vice President of Business Development to the President of its Filtration Group identifying a "notable area of overlap" in "ground aviation fuel filtration" and asking whether the company should be "forthcoming" about this "aviation antitrust potential." The email allegedly went on to state that the company was "preparing for the possibility that we may have to divest" the overlapping CLARCOR business.

In its press release, the DOJ pointedly asserted that "[d]uring the pendency of the department's investigation, Parker-Hannifin failed to provide significant document or data productions in response to the department's requests." It is not clear whether this refers to an HSR Act waiting period inquiry, or to a CID investigation begun post-closing, possibly in response to customer

complaints. DOJ further noted its displeasure that Parker-Hannifin had not "agreed to enter into a satisfactory agreement to hold separate the fuel filtration businesses at issue."

The litigation serves as a stark reminder that the U.S. antitrust agencies can and do review consummated transactions, even if reported. While many believe the HSR Act review process offers finality, the expiration of the HSR Act waiting period does not preclude investigation and challenge post-closing. In other words, unlike some foreign merger regimes, DOJ has continuing authority under Section 7 of the Clayton Act beyond the HSR Act waiting period.

This case is the third merger challenge that the DOJ has filed in Delaware federal court in recent years. (The DOJ also filed its Halliburton/Baker Hughes and EnergySolutions/Waste Control Specialists challenges in Delaware.) Earlier this year, the DOJ successfully prosecuted the EnergySolutions merger challenge through a multi-week trial. Consequently, the DOJ could continue to bring lawsuits in Delaware or other jurisdictions where one of the merging parties is incorporated if it believes that doing so could provide it a more advantageous venue.

*Parker-Hannifin* suggests several practical lessons for merging parties:

- While there is no legal duty to raise every potential competitive issue affirmatively, parties should assume customers or competitors will identify overlaps, and be prepared to cooperate with a DOJ investigation or face litigation.
- Internal documents continue to be the single most visible type of evidence used in merger challenges, so practical counseling for executives involved in M&A can add value by reducing risk from an unhelpful record.
- Customer reaction remains a crucial input to agency decisionmaking, so a comprehensive and effective customer communication program is a critical element of successful merger clearance.

As it progresses and the sequence of events becomes clearer, the *Parker-Hannifin* litigation may provide additional insights for companies undertaking deals with competitive issues that may not be immediately obvious from public sources or Item 4 documents. For now, the filing appears to be a cautionary tale: in the U.S., merger review is not over until it's over.

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