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Merger Reviews To Watch In 2016

By **Melissa Lipman**

Law360, New York (December 24, 2015, 8:38 PM ET) -- Megamergers between rivals abounded in 2015, from two of the world's biggest brewers deciding to join forces to the only remaining office supply superstore chains in the nation taking another crack at a deal the government shot down in the 1990s, leaving antitrust enforcers plenty to mull over in 2016.

Add to that a continuing willingness at both the U.S. Department of Justice and the Federal Trade Commission to take companies to court to block a deal, and 2016 is set to be another banner year for merger review work.

In 2015, the two agencies continued to rack up wins both from judges blocking deals — as in the FTC's challenge to a tie-up of two broadline food distributors — and from companies abandoning deals that were either about to be challenged or in litigation, as happened with a merger of two of the world's biggest canned tuna producers and AB Electrolux's bid to acquire General Electric Co.'s appliance business.

The only litigated loss came in the FTC's suit against an inversion deal between Steris Corp. and Synergy PLC that was predicated on an unusual, and typically more difficult, theory about competition that Synergy would have created against Steris at some point in the future.

"The win rate is going to be important at both agencies because it really sets the mood for those of us that practice in this area as to what can and can't be done," said Skadden Arps Slate Meagher & Flom LLP partner Cliff Aronson. "It's very important to watch the high profile wins and give [the agencies] credit for them and learn from them, but also to watch the high-profile losses and ... use them to give advice to clients."

Here's a look at the merger reviews and challenges to watch this year:

Staples-Office Depot

With GE pulling the plug on its deal with Electrolux just before the end of last year, the antitrust agencies only have one major merger challenge in court to start 2016: The FTC's bid to block Staples Inc. from buying Office Depot Inc. for $6.3 billion.

The case is something of a reprise for the FTC in more ways than one. The agency sued to block an earlier attempt the two companies made to join forces in the 1990s, at the time premising the successful challenge on a concern about the consolidation of two of the three office supply superstore chains.

But the new complaint filed in early December takes a page from the FTC's winning 2015 case blocking Sysco Corp. and US Foods Inc. from merging, this time arguing that the deal would harm competition for office supply sales to large businesses that need nationwide delivery, specialized offerings and dedicated customer service.

"What's interesting about the FTC complaint challenging the Office Depot-Staples merger is they are not focusing on the retail market at all but instead are focusing on an alleged market for the sale of office supplies to large companies," said Hughes Hubbard & Reed LLP partner William Kolasky. "That's a theory very similar to the one they used to block the US Foods-Sysco merger earlier this year, so I think we're seeing a pattern at the FTC looking at these narrower markets ... and challenging a merger on that basis."

Anthem-Cigna and Aetna-Humana

Since July the Justice Department has been looking at a pair of health insurance mergers that could reshape the industry, with Anthem Inc. looking to scoop up rival Cigna Corp. for $54.2 billion and Aetna Inc. agreeing to pay $37 billion for Humana Inc.

The two deals were already set to face a tough review given the complexity and the high-profile nature of the markets involved, to say nothing of the fact that the DOJ generally takes one merger into consideration when evaluating the other in these types of circumstances.

But then Bill Baer, the assistant attorney general in charge of the Antitrust Division, gave a speech in November voicing his doubts about the benefits of consolidation in the industry, suggesting that consumers don't benefit when buyers merge "simply to gain bargaining leverage."

"Those two twin mergers are going to attract very close attention from the Antitrust Division," Kolasky said. "Because we already have a fairly high degree of concentration in the health insurance marketplace, clearly they're going to be looking at the extent to which [the mergers] are going to give these two entities greater bargaining power with healthcare providers."

The deals are also relatively high-risk transactions, with the DOJ expected to look for the first time at what the new health care exchanges have brought to the competitive landscape, attorneys said.

AB InBev-SABMiller

The DOJ is also taking its second look in two years at the beer market with Anheuser-Busch InBev's $100 billion bid to create a new industry behemoth by joining forces with SABMiller PLC. Last time around, the watchdog took a tough approach to AB InBev's efforts to acquire Grupo Modelo SAB de CV, forcing the company to divest not just the brand but a bottling factory to settle an antitrust challenge.

This time, attorneys said it will be interesting to see whether AB InBev has gotten it right with its plan to shed Miller's stake in its U.S. joint venture with Molson Coors as well as the potential sale of two of SABMiller’s European brands, Peroni and Grolsch, to secure approval from the European Commission.

"They've offered up a divestiture and I think that ought to be enough, but there appears to be a good bit of political opposition," said Crowell & Moring LLP's Mary Anne Mason.

One theory that could hold water even with the divestiture of MillerCoors is a concern about the control that the two brewers have over beer distribution. The question there would be whether the two companies together could either cut off craft brewers' access to distribution channels or make it too expensive for smaller competitors to distribute their beers, Mason said.

"The craft beer industry is worried that they're going to be shut out," Mason said. "That theory, it's a hard one to prove if it went to litigation. I would be surprised if the agency were to win."

Halliburton-Baker Hughes

One merger that the DOJ is rumored to be considering challenging is a $34.6 billion merger between Halliburton Co. and Baker Hughes Inc., two of the three oil field services providers in the country.

Indeed, the companies confirmed in mid-December that the agency had rejected their previous offers to sell off businesses to secure approval, though they said the DOJ is still open to future offers. That could indicate the watchdog is simply taking a hard line to get the companies to give up more assets or it could point to a more existential threat to the deal about the companies' ability to come up with a divestiture package or find an acceptable buyer in a highly concentrated market.

"My understanding is the DOJ could well sue, so I think people are definitely keeping an eye on that," said Cleary Gottlieb Steen & Hamilton LLP partner Leah Brannon.

Meanwhile, the enforcement wing of Brazil's antitrust enforcer has also already recommended blocking the deal, pointing out that state-controlled energy company Petrobras is the companies' largest customer in the country. Halliburton and Baker Hughes could still reach a settlement with the agency, though a deal wasn't mentioned when the watchdog announced the recommendation in December. Australia's antitrust agency has also voiced concerns about the tie-up.

"They're working hard from what I understand on divestitures ... they went into it understanding that it was going to be tough and they were going to have to give up some assets," Mason said. "The question is if they have to give up too much to undermine the deal value."

Dow-Dupont

One of the biggest and last deals to be announced in 2015 was Dow Chemical Co.'s plan to join forces with DuPont Co. in a merger of equals that will create an industry behemoth with a combined market capitalization of $130 billion.

The two companies then plan to spin off into three independent, publicly traded companies: an agriculture company, a material science company and a specialty products company.

The spinoffs themselves shouldn't affect the antitrust analysis because the deal will still eliminate one competitor in each product segment. But that doesn't mean that Dow and DuPont aren't in for a long, complex competition review.

"There aren't that many major chemical company mergers generally and then to have one of this size and importance with the large number of product lines across a wide variety of product types:

chemicals, performance chemicals, agriculture," said Haynes and Boone LLP's Thomas Lang. "This is a complicated transaction and the number of different experts and different that's going to be required to review this merger makes it likely to take a long time."

That being said, Lang predicted the deal could ultimately play out like a typical pharmaceutical merger, and move forward with divestitures.

"You've got to figure out which products are actually competing with one another and then do the antitrust analysis on those individual product markets," Lang said. "But I think ... even though both companies make and sell a large number of products, there aren't really that many products where they compete directly with one another in a concentrated product market."

--Additional reporting by Chelsea Naso and Jeff Overley. Editing by John Quinn and Rebecca Flanagan.