Updates
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“Reasonableness” Is in the Eye of the Beholder: Vague Contracts Clauses Invite Litigation

Schick, the shaving product company, recently announced it was abandoning its proposed $1.4 billion acquisition of rival startup Harry's Razors. The announcement followed the U.S. Federal Trade Commission's (FTC) threat to block the deal in federal court over antitrust concerns. Harry's has reportedly threatened to sue Schick for failing to exercise "reasonable best efforts" to get the deal through merger review. It is one of an increasing number of these "broken deal" claims, which may be prevented by more specific antitrust provisions in the merger agreement.

Avoid Vague Antitrust Terms

When a transaction requires antitrust review under the Hart-Scott-Rodino (HSR) Act or foreign merger control laws, merger agreements generally include antitrust-specific provisions detailing the level of effort the buyer must exert to move the deal through merger review. Such terms typically consist of "best efforts," "reasonable efforts," or "reasonable commercial efforts." In rare cases, a buyer may be required to undertake "any or all necessary actions" to obtain clearance, including divestiture of assets or changes in commercial relationships between the buyer and third parties (known as "hell or high water" obligations). But these terms are inherently vague, and in the context of antitrust-related obligations, there is little or no judicial guidance on precisely what actions they require.

For example, assume that following a 30-day preliminary investigation, the FTC or U.S. Department of Justice (DOJ) issues HSR "second requests" to the parties. Compliance with these requests may delay the deal 10 or more months and require the buyer (and seller) to incur well over a million dollars in legal fees and related expenses. Does a "best efforts" clause require the parties to comply with the requests? Assume that following compliance, the agency threatens to block the deal in court. Must the parties litigate the case?

A related issue is whether the termination provisions of the agreement address the possibility of an investigation. If the "outside" (or "drop dead") date arrives, can the buyer or seller simply walk away from the deal without liability to the other? This lack of clarity can invite "broken deal" litigation where one party to an unsuccessful deal sues the other for failing to put forth the "efforts" required to obtain merger clearance. In fact, we have observed an increase in this "broken deal" litigation over the past few years. *See, e.g.*, W*hirlpool Corp. v. Nidec Corp.*, No. 19-cv-02155 (S.D.N.Y. 2019); *Tribune v. Sinclair*, No. 2018-0593 (Del. Ch. 2018); *In re: Anthem-Cigna Merger Lit.*, 2017-0114 (Del. Ch. 2017).

The failed Schick/Harry's merger and subsequent threatened litigation demonstrate a number of these problems. The FTC sued to block the deal and instead of litigating, Schick walked away. According to the *New York Post*, Harry's co-founders said in a statement they were "disappointed by the decision by [Schick's parent company] board not to see this process to its conclusion" because Harry's believed the parties would have "prevailed in litigation." According to Edgewell's (Schick's parent company) SEC filing, the agreement required that both companies "use reasonable best efforts to take all actions necessary . . . to consummate the Merger . . . , including obtaining relevant governmental and third party approvals." Perhaps the threatened litigation could have been avoided if "reasonable best efforts" was defined with more clarity.

We recommend merging parties include more specific and objective criteria for the obligations they must undertake. For example, the merger agreement could specify whether prior to walking away from the deal, the buyer must perform the following:

- Comply with a second request or agency investigation
- Offer to divest certain assets to resolve an agency's concerns
- Litigate an agency's merger challenge in an administrative hearing, state court, or federal court, including through any appeals

Other increasingly popular solutions are break-up fees and reverse break-up fees. These provisions allow the buyer or seller to walk away from the deal for any reason if they pay a required fee to the other party. Experienced antitrust counsel can advise parties on these solutions and weigh their costs and benefits.

Takeaways

The recent announcement serves as a useful reminder that deals derailed by the merger review process may result in subsequent litigation. Such claims are becoming more common, but there are few if any judicial decisions defining "best efforts," "reasonable efforts," etc. regarding antitrust clearance efforts, making clarity in drafting a necessity.

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