Updates
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Acquisitions of Firms in Bankruptcy Are Subject to the Antitrust Laws

The economic damage attendant to COVID-19 has already resulted in a substantial increase in bankruptcies. Acquisitions through U.S. bankruptcy courts are not exempt from challenge by government antitrust enforcers or private parties in U.S. district courts.

The existence of separate judicial tracks reflects the differing purposes of those laws. The antitrust laws are designed to preserve competition and focus on a deal's likely impact on customers in a relevant market—including, but not limited to—the debtor's customers. The bankruptcy laws, by contrast, are designed to elicit a "highest and best offer" to maximize the return to the debtor's creditors. Where a competitor of a bankrupt firm is willing to pay more than any other buyer because the transaction will permit the competitor to raise prices, the purposes of bankruptcy and antitrust laws will conflict. Clients considering acquisitions of competitors in bankruptcy should not ignore potential antitrust exposure arising from such transactions.

The Hart-Scott-Rodino Act Provides Limited Accommodations for Bankruptcy-Related Transactions

The HSR Act requires parties to an HSR-reportable transaction to file reports with the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC), then wait 30 days before closing to provide the antitrust agencies an opportunity to review the transaction. Reportable transactions are those in which the parties satisfy a "size of transaction" test (currently $94 million) and a "size of person test." If either agency opens a formal investigation by issuing "second requests" for information, the transaction is stayed until both parties substantially comply, a process that typically takes six to nine months. If, following compliance, the reviewing agency concludes the acquisition may substantially reduce competition, it may challenge the transaction in U.S. district court. The litigation will extend the stay another four to six months.

The Bankruptcy Code amends the HSR Act by providing an expedited 15-day (rather than 30) review period for sales of a debtor's property under Bankruptcy Code Section 363 (b). The HSR filing can take place only after the bankruptcy has been initiated. The filing on behalf of the debtor (as the "acquired person" for HSR purposes) is made by the trustee (or "debtor in possession" in a typical Chapter 11 case). The buyer's filing is made by its ultimate parent entity. The 15 days do not begin to run until both the trustee and the acquiring person have filed.

The bankruptcy court's "highest and best offer" analysis does not address substantive antitrust concerns. Yet, in deciding whether to approve the transaction, the bankruptcy court may take into account the likelihood the transaction may not be the best deal for the debtor because it may not survive antitrust review. As a practical matter, if the FTC or DOJ is likely to issue second requests, the open-ended delay and uncertainty attendant to antitrust review will almost inevitably lead the bankruptcy court to deny approval.

Bankruptcy Law's Impact on Antitrust Enforcement Decisions

The antitrust enforcement agencies have made clear that transactions driven by COVID-19-related financial distress will be analyzed no differently than transactions involving other financially distressed firms. Where the

acquisition of a distressed firm by a competitor threatens substantially to lessen competition, the fact that the buyer offered appreciably more for the business than did other bidders is irrelevant.

The parties may argue that for antitrust purposes, the bankrupt firm is a "failing company" whose acquisition will not impair future competition in the relevant market. To establish status as a "failing company," the debtor must prove to the district court that, among other things, the firm made unsuccessful good faith efforts to elicit reasonable alternative offers that would have posed a less severe danger to competition. The agencies regard any offer above liquidation value as "reasonable," because such an offer signals that the buyer intends to keep the assets operating in the relevant market.

Takeaways

A client proposing to acquire a competitor in bankruptcy in an HSR-reportable deal must develop strategies to convince the seller, other financial stakeholders, and the bankruptcy court that antitrust concerns will not derail the transaction. The client should also be prepared to persuade the antitrust agencies the deal does not pose material competitive concerns, or, if such concerns exist, that they may be addressed by a divestiture of specific assets or another remedy.

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