Antitrust Alert: Antitrust Is Alive and Well and Lurks in Unlikely Places

Or, How to Keep Your CEO off the Witness Stand

BY TYLER BAKER AND MARK OSTRAU

Fenwick
FENWICK & WEST LLP

A recent story in the Bay Area legal newspaper *The Recorder* had this headline: "Former Bazaarvoice CEO Takes Stand to Explain Damning Email." That is not the kind of media attention that any CEO likes to have or the way he or she wants to spend time. The unfortunate situation was the result of a change that many business people have not recognized: Antitrust enforcement is back, and one place that it is really back is merger enforcement. The pending Bazaarvoice trial is a clear reminder that there are a number of misconceptions about antitrust enforcement of mergers that can be dangerous and costly, resulting in broken deals, unwanted trips to the courthouse, or both.

First, many people think that only mergers between giant companies are subject to antitrust scrutiny. In fact, everything depends on the markets involved in the merger. Some markets are small, and a merger of two relatively small companies in such a market may yield a high market share that will excite the antitrust enforcers. Recent challenges have involved various markets where total annual sales of all participants fell well below $100 million — and in some cases below $20 million.

Second, and related to the first, many people think that mergers below the reporting thresholds of the Hart-Scott-Rodino Act are home free. Not so. Those thresholds are designed to catch most problematic mergers, but they do not create a safety zone. The enforcement agencies have people watching for reports of mergers that might create competitive problems, often aided by unsolicited contacts from customers or other industry participants. While the number of problematic mergers below the reporting thresholds is small, they do exist, and the enforcement agencies find many, if not most, of them. In fact, the agencies have challenged over a dozen such transactions in the last three years alone.

Third, many people think that mergers that have been consummated won't be challenged, especially if the two companies have been structurally combined. Again, wrong. It is hard to unscramble the eggs once the omelet has been made, and the burden on the enforcement agencies in such cases may be higher. But that does not mean that they cannot or will not try. The challenge to the Bazaarvoice acquisition of PowerReviews is just such a case.

The worst thing about these misconceptions is that they cause people to be sloppy and careless and to do stupid things, particularly when it comes to writing emails. The former CEO in Bazaarvoice forwarded to his board an email written by another manager in the company. It said that the merger would leave Bazaarvoice with "no meaningful direct competitor." That is like dangling red meat in front of a hungry lion for the enforcement agencies. Not to be outdone, the CEO of PowerReviews wrote an email that said the deal would create a "barrier to entry for sub-scale firms," using the actual jargon of antitrust.

The obvious message is that everyone associated with potential acquisitions needs to be careful about writing emails that talk in terms of the advantages of the potential deal eliminating competitors, suppressing competition, raising price, or similar things. This applies from the earliest time when deals are being considered, particularly by the business development people who are trying to "sell the deal" to others inside the company. When the enforcement agencies come calling, they will scoop up all the emails that concern the target, and they will find the juicy ones.

There is a degree of bad luck in having a relatively small merger challenged. The odds are against it, but the cost is high when it happens. It is worth having an antitrust lawyer take a look at a deal at an early stage to see if it looks like a problem. In addition, however, it is really important to spread the word

within the company about good document creation practices. A challenge is much more likely when the senior management of one or both of the companies has said things in documents that appear to prove the government's case.

For more information please contact:
Tyler Baker, 650.335.7624, tbaker@fenwick.com
Mark Ostrau, 650.335.7269, mostrau@fenwick.com
