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Shy: The *Bazaarvoice*
Decision

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Prior to 2011, the United States Department of Justice, Antitrust Division (“DOJ”) carried the characterization “dazed and gun shy” when it came to trying merger cases.² The DOJ had not actively tried a merger case since its loss in *Oracle* in 2004.³ *Oracle* came to stand for the proposition that something was wrong with the way the DOJ was trying merger cases; the DOJ’s trial strategy was less than viable. Commentators, when discussing *Oracle*, have gone so far as to evoke an image of the judge as coroner presenting the cause of death for the DOJ’s case.⁴ As a result, the DOJ was forced to take a hard look at how it tried merger cases.

Post-*Oracle*, an introspective DOJ appeared to become less active in the courthouse, settling most challenged transactions prior to litigation.⁵ That has changed.

In its first merger challenge to go to trial since *Oracle*, the DOJ won a permanent injunction against H&R Block’s \$287.5 million cash acquisition of TaxACT in October 2011.⁶ Just prior to that win, in September, the DOJ had made a striking move to halt negotiations with AT&T regarding its \$39 billion proposed takeover of T-Mobile, and filed its complaint in court. AT&T had met with the DOJ repeatedly and, according to AT&T, the DOJ gave no indication that it was considering filing a complaint.⁷ Without a resolution in sight, AT&T abandoned the transaction in December 2011.⁸

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² J. Thomas Rosch, *Changing the Way We Try Merger Cases*, Remarks of FTC Commissioner before the 14th Annual Sedona Conference on Antitrust Litigation: Strategic & Tactical Considerations in the Trial of an Antitrust Case, at 2, Oct. 25, 2012.

³ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

⁴ Rosch, *supra* note 2 at 4 (“Judge Walker . . . in his post-mortem discussions of the customer testimony”; citations omitted).

⁵ In 2008, DOJ challenged 16 transactions, 15 resulted in consent decrees and 1 was restructured. Hart-Scott-Rodino Annual Report, Fiscal Year 2008, at 2. In 2009, DOJ challenged 12 transactions. 6 resulted in consent decrees, and 1 transaction was abandoned after the complaint was filed. The other 5 transactions were abandoned or restructured. Hart-Scott-Rodino Annual Report, Fiscal Year 2009, at 2. In 2010, DOJ challenged 19 transactions. 10 resulted in consent decrees, and 1 (Dean Foods) was in litigation at the time of the report. 8 of the transactions were abandoned or restructured. Hart-Scott-Rodino Annual Report, Fiscal Year 2010, at 2.

⁶ In 2011, DOJ challenged 20 transactions. 13 were “brought in court”; of those, DOJ successfully litigated 1 (H&R Block/TaxACT). 11 resulted in consent decrees, and 1 transaction was abandoned (AT&T/T-Mobile). Hart-Scott-Rodino Annual Report, Fiscal Year 2011, at 2.

⁷ “AT&T said yesterday that it was surprised by the government’s lawsuit and that it will ask for an expedited hearing. . . . ‘We have met repeatedly with the Department of Justice and there was no indication from the DOJ that this action was being contemplated,’ Wayne Watts, AT&T’s general counsel, said in a statement.” Bloomberg, Tom Schoenberg, Sara Forden, & Jeff Bliss, *T-Mobile Antitrust Challenge Leaves AT&T With Little Recourse on Takeover*,

H&R Block and AT&T/T-Mobile appear to have marked a change, or at least a willingness, at the DOJ to negotiate merger remedies in litigation, demonstrating a new “litigation-ready” mentality.⁹ This shift to filing lawsuits raises serious policy questions. It has the potential to position merging parties into early adversarial stances, which could lead to far less constructive capacity for transparent discussions about a deal with competitive implications. And this “litigation-ready” mentality can leapfrog the exercise of critical prosecutorial discretion. Put another way, this aggressive mentality can overcome the basic initial question whether the agency **should** take action, leading to early and often lawsuits anytime it **can**. Given the stakes to businesses, that outcome courts danger. Take the recent *Bazaarvoice* case.

On June 12, 2012, Bazaarvoice acquired PowerReviews, both competitors and providers of ratings and reviews platforms (“R&R”), in a transaction falling below HSR thresholds. The DOJ launched an investigation two days later, and on January 10, 2013, it filed a lawsuit in district court challenging the merger under Section 7 of the Clayton Act. In a 141-page “necessarily lengthy” opinion, Judge Orrick of the Northern District of California held that Bazaarvoice’s purchase of its closest and only serious competitor was anticompetitive in a narrowly defined R&R product market.

Bad documents gave the DOJ the ability to bring the case. The court found that Bazaarvoice and PowerReviews’ own internal documents “overwhelmingly” showed that the companies “viewed themselves as operating in a ‘duopoly’” and that eliminating PowerReviews “would eliminate Bazaarvoice’s only meaningful commercial competitor.”¹⁰ But should the DOJ have pursued it? A 141-page opinion might seem on its face to answer that question. But it’s not that clear cut; every private practitioner has seen bad documents that actually had little, if any, bearing on the actual facts or company’s decisions.

Bazaarvoice combined two “young” technology companies, one of which was not profitable and has never been profitable and another which was set to run out of cash by year-end,¹¹ in a “new, dynamic,” and “constantly evolving” social commerce industry in its “early stage of development.”¹²

Even as narrowly defined, market share based on customer revenues would only leave the combined new entity at 56 percent (Bazaarvoice with 41 percent and PowerReviews with 15

available at: <http://www.bloomberg.com/news/2011-08-31/u-s-files-antitrust-complaint-to-block-proposed-at-t-t-mobile-merger.html>.

⁸ DOJ Press Release, *Justice Department Issues Statements, Regarding AT&T Inc.’s Abandonment of its Proposed Acquisition of T-Mobile USA Inc.*, December 19, 2011, available at www.justice.gov/atr/public/press_releases/2011/278406.htm.

⁹ “Under [Assistant Attorney General Bill] Baer and his predecessors, the division has coined a term—‘litigation-ready’—to represent a new willingness to go to court, and it has built up its courtroom experience with the hiring of its first director of litigation, Mark Ryan.” “Time is not the friend of these merging companies. Litigation as a playing-out-the-clock process is something that helps the government,” he said.” Reuters, *In airline suit, U.S. antitrust enforcers try to build on wins*, David Ingram, Aug. 13, 2013, available at: <http://www.reuters.com/article/2013/08/13/us-amr-usairways-lawsuit-outlook-idUSBRE97C11V20130813>.

¹⁰ *United States v. Bazaarvoice*, 13-cv-00133, 2014 WL 203966, at 6 (N.D. Cal. Jan. 8, 2014).

¹¹ *Id.* at 74, 114.

¹² *Id.* at 19.

percent prior to the transaction) standing in minimal contrast to in-house, self-developed R&R solutions, which accounted for 42 percent of the market.¹³ Amazon alone accounted for 28 percent of the relevant market, developing its own R&R platform.

The court found that there were significant barriers to entry and expansion in the R&R market, including network effects from syndication, high switching costs, intellectual property/know how, and reputation.¹⁴ Yet, both the DOJ and the court seemed to ignore that viable foreign technologies could begin selling in the United States anytime (despite acknowledging that R&R software is generally sold worldwide “quite easily”),¹⁵ and that e-Commerce platform companies like Oracle that could add the R&R functionality at any time.¹⁶ The court also dismissed the fact that Bazaarvoice and PowerReviews customers (comprising almost half of the IR500 companies) could themselves develop in-house solutions just as Amazon had successfully done. According to Judge Orrick, these customers just did not know what they were talking about.¹⁷

Bazaarvoice, really? Combined 56 percent? Nascent technology market with half the customers already using self-developed alternatives? And tech behemoths in adjacent platform space able to add alternatives at any time? And zero customer concerns?

Bazaarvoice presents a strong word of caution: it may signal that the antitrust agencies will now bring a case anytime evidence can support a mere complaint—overcoming holistic views based on full evidence and bypassing the all too critical role responsible government requires in the prosecutorial discretion arena.

¹³ *Id.* at 65.

¹⁴ *Id.* at 133.

¹⁵ *Id.* at 52.

¹⁶ *Id.* at 87.

¹⁷ *Id.* at 8.