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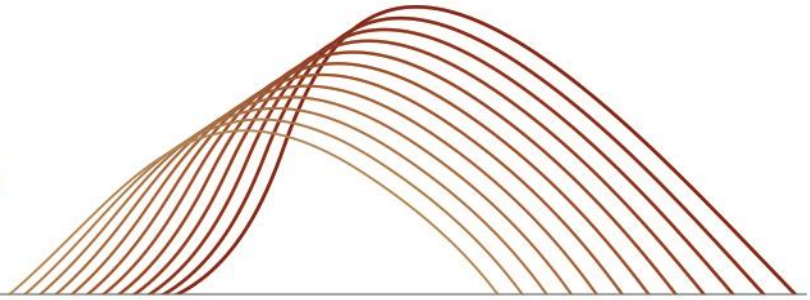

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DOJ Shows That There Is No Such Thing as HSR "Approval"

By Michael S. Wise & Noah Pinegar

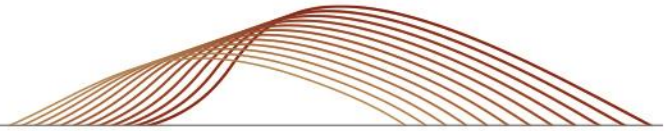
The Department of Justice Antitrust Division settled a rare challenge to a consummated $4.3 billion merger on Monday, requiring Parker-Hannifin to divest aviation fuel filtration assets that it acquired from CLARCOR Inc. earlier this year. The case is a reminder that expiration of the waiting period under the Hart-Scott-Rodino Act ("HSR Act") does not provide a safe harbor against a Clayton Act challenge.

Parker-Hannifin and CLARCOR were both active in providing fuel filtration systems. The parties executed an Agreement and Plan of Merger on December 1, 2016 and filed notification with the U.S. antitrust authorities two weeks later. The 30-day waiting period under the HSR Act expired on January 17, 2017, without triggering an in-depth investigation, commonly referred to as a Second Request. The companies closed the deal shortly thereafter, on February 28.

In spite of the closing, the Antitrust Division took an interest in the deal. The Division issued a Civil Investigative Demand for production of documents in late July, and that was followed by a Complaint for violation of the Clayton Act, filed on September 26, 2017.[1] According to the Division, the deal eliminated "all head-to-head competition between the only two domestic manufacturers of… critical aviation fuel filtration systems."[2] For CLARCOR, the specific area of overlap accounted for only $20 million in 2016 revenue.

Remarkably, the DOJ did not allege a violation of the HSR Act itself, a strong indication that the parties filed the correct notification and documentary attachments. In the absence of a Second Request, the parties appear to have been compliant with the HSR Act's requirements when they closed their transaction. Nevertheless, Parker-Hannifin was apparently aware that the transaction carried some antitrust risk—the Complaint quotes an internal Parker-Hannifin email predating announcement of the deal describing the potential for a divestiture. It appears that the parties took a chance that the potential competitive impact of the deal on the overlapping market would not trigger any challenge. In this case at least, that strategy did not pay off.

Parker-Hannifin follows a more common challenge to a consummated deal—when no HSR was triggered—earlier in 2017. In *FTC v. Mallinckrodt*, the DOJ's sister agency unwound a 2013 drug acquisition by Questcor. Questcor had acquired Synacthen Depot, a synthetic version of Acthar, used to treat infantile spasms and nephrotic syndrome. The acquisition, according to the Complaint, squashed the nascent threat. The *Mallinckrodt* settlement included $100 million in equitable relief and a sublicense to the Synacthen Depot drug.



These recent enforcement efforts underscore the fact that compliance with HSR requirements is not the same as obtaining antitrust "approval" for a transaction. Even where parties comply with their notification requirements or do not trigger a notification in the first instance, the risk of an antitrust challenge remains if it comes to light that the deal has eliminated competition. In addition, the challenge serves as a reminder that "size" often does not matter in an antitrust review. Whether the deal itself is below the notification thresholds, or the overlapping business is but a small part of the overall deal, parties in strategic deals should carefully consider potential antitrust issues and seek antitrust counsel input early to avoid a surprise down the road.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

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[1] Defendants' Answer at 2.

[2] DOJ Complaint at 1.