

**THE FEDERAL TRADE COMMISSION DISSOLVES CONSUMMATED MERGER**

In August of 2006, the Federal Trade Commission (the “FTC”) approved a final consent order that required a divestiture that largely unwound a merger that had allegedly reduced the number of significant competitors in the relevant market from two to one. The consent order is notable because the merger was not reportable under the Hart-Scott-Rodino Act (the “HSR Act”) and the FTC secured the divestiture only nine months after the merger had been consummated.

On September 29, 2005, Hologic, Inc. paid \$32 million to acquire from Fischer Imaging Corporation substantially all of the intellectual property and certain other assets relating to Fischer’s mammography and breast-biopsy businesses (the “Acquisition”). Through the Acquisition, Hologic acquired ownership of Fischer’s prone stereotactic breast biopsy system (“prone SBBS”), called MammoTest, as well as the intellectual property rights relating to MammoTest. Prone SBBSs are the most economically viable minimally invasive means available to conduct breast biopsies.

Shortly after the Acquisition was consummated, the FTC launched an investigation. The FTC concluded that the Acquisition violated Section 7 of the Clayton Act because it effectively eliminated competition in the production and sale of prone SBBSs, as Fischer had been Hologic’s only viable competitor in connection with prone SBBSs. After reviewing a draft of the FTC’s complaint, Hologic agreed to a consent order that compelled it to divest all of the Fischer prone SBBS assets and intellectual property that it had acquired and to transfer such assets and intellectual property to Siemens AG. The order contemplated the sale of the Fischer assets to Siemens as an ongoing business and allowed Hologic to retain a license to Fischer’s prone SBBS patents so Hologic could continue to compete in the sale of prone SBBSs.

This case is unusual for two reasons: (1) the FTC does not frequently challenge nonreportable transactions; and (2) such challenges do not typically occur so soon after the consummation of a transaction. Before the Acquisition, Fischer was Hologic’s main rival in prone SBBSs. Only one other firm, Giotto USA, sold prone SBBSs in the United States. The FTC argued that Giotto’s U.S. sales had been so minimal that Giotto could not be considered a serious competitor. In addition, the FTC concluded that Giotto could not significantly expand its U.S. sales to constrain the Hologic/Fischer combination because Giotto lacked access to important SBBS patents and the necessary infrastructure and reputation to improve its ability to compete in the U.S. market.

According to the FTC, the Acquisition gave Hologic a virtual monopoly over prone SBBSs. The FTC further contended that no economically viable substitutes to prone SBBSs exist for the performance of minimally invasive breast biopsies. Hologic, accordingly, would be able to raise its prices for prone SBBSs unilaterally without reducing its market share. The FTC also expressed strong concern over the intellectual property barriers that would result from the Acquisition. If Hologic obtained the intellectual property rights over prone SBBS technology

that Fischer had owned, new entities could not reasonably develop, without Hologic's consent, the technology necessary to compete effectively with Hologic's SSBSs. According to the FTC, not only did the Acquisition give Hologic a monopoly over the production and sale of prone SBBSs, the acquired patents also gave Hologic the means to impede or prevent the future entry of new competitors.

### **Implications**

Where a transaction reduces the number of significant competitors in a relevant market from two to one and gives the buyer intellectual property rights that would allow it to impede or prevent entry into that market, the transaction is likely to attract strict government scrutiny, even if the transaction has not been reported pursuant to the HSR Act.

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