Fidelity Deal Review Suggests There's A Maverick At FTC

Law360, New York (January 09, 2014, 6:22 PM ET) -- Under the antitrust merger guidelines, a maverick is a firm “that plays a disruptive role in the market to the benefit of customers.” In Washington, D.C., political circles, a maverick often refers to a politician that does not hew faithfully to the party line.

On the surface, the Federal Trade Commission’s 3-1 initial approval of a consent decree, announced right before Christmas, resolving its review of Fidelity National Financial Inc.’s $2.9 billion deal to acquire Lender Processing Services Inc. looks pretty straightforward. The proposed consent decree would require Fidelity to divest certain title insurance assets in nine Oregon counties to avoid 3-2 and 4-3 reductions in the number of competitors, where there would be no timely entry to replace the lost competition. Yet FTC Commissioner Joshua Wright dissented from the issuance of the complaint and consent decree, suggesting that the commission’s action was “based solely” upon this structural analysis, which he found insufficient.[1]

Fidelity is the largest title insurance provider in the United States and a major mortgage services company. LPS’ underwriting activity is small by comparison, a complementary operation to LPS’ key business as a leading provider of technology solutions, transaction services, and data and analytics to the mortgage and real estate industries.

The FTC’s competitive concerns arise from the title plant activities each company uses to support its title insurance underwriting activities in certain Oregon counties. Title insurance underwriters require access to county-level title information contained in title plant databases. In Oregon, state law requires title insurance underwriters or their agents to own a title plant in each county in which they issue policies. In the Oregon counties focused upon by the commission, the transaction would eliminate one of only a few underwriters available in the relevant market, sometimes reducing the number of competitors from three to two.

Antitrust practitioners have long counseled that transactions that reduce the number of competitors from three to two are provocative, if not problematic. Those who have contested the concentration presumption in such cases by arguing specific market facts have normally failed — for example, the FTC’s successful challenge of the baby food merger over a decade ago.[2]

However, Commissioner Wright argued in his dissent that the 2010 revision of the horizontal merger guidelines requires more than simply arithmetic, a position he has articulated previously.[3] According to Wright, the guidelines increased focus on “modern coordinated effects analysis is not merely upon the number of firms but rather ‘whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction.’”[4]
Wright focused upon the guidelines’ statement that the antitrust agencies are not likely to challenge a merger unless (1) “the merger would increase concentration and lead to a moderately or highly concentrated market”; (2) “the market shows signs of vulnerability to coordinated conduct” and (3) “the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.” [5]

Commissioner Wright argued that while market structure may help the assessment of the first two conditions, “the guidelines require more than the observation that the merger has decreased the number of firms to satisfy the third condition.”[6] Commissioner Wright did not think that there was anything “more” there; the majority in its statement suggests both that the structural presumption is relevant to the third prong, and besides, it did consider other things.[7] Since that review ended with a consent decree, the issue will never be resolved in this case.

What this matter suggests is two things. First, Commissioner Wright continues to stake out a position in many areas, including with respect with merger enforcement, as a maverick. For example, Commissioner Wright has already publicly urged the FTC press on courts to incorporate evidence-based competitive effects — as opposed to the structural presumption first adopted by the U.S. Supreme Court in Philadelphia National Bank[8] — into their analyses.

Arguing that “[m]odern economic learning and empirical evidence does not support the notion that mergers that generate a post-merger firm with greater than 30 percent share are systematically more likely to be anticompetitive,”[9] Wright opined that the agency erroneously relies on the presumption as a crutch “to shift the burden to defendants when courts are not otherwise persuaded by a competitive effects story.”[10]

Wright has also advocated that the FTC give serious consideration of efficiencies that are outside the relevant product market, contending that such an approach is more consistent with modern economic trend of “analyzing actual competitive effects rather than adopting simplified and potentially misleading proxies for harm.”[11]

Thus, it is probable that Commissioner Wright will continue to press the FTC to alter its merger analysis, urging the agency to adopt an approach more in line with “modern economics.” And in some future transaction, where the competitive issue is more central to the transaction, Commissioner Wright's analysis and statement may provide a renewed basis to attempt to successfully defend a 3-2 merger.

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[5] Supra note 2, at 3.

[6] Id.

[7] See Statement of the Federal Trade Commission, In the Matter of Fidelity National Financial, Inc. and Lender Processing Services, Inc., File No. 131-0159, Dec. 23, 2013 (The FTC defended its action against dissenting Commissioner Joshua Wright’s assertion that the agency’s analysis was based solely on its assumption that the merger would decrease the number of underwriters operating in the relevant markets. In addition to consideration of merger effects from the decrease in competitors, the FTC also considered whether other market factors, such as the possibility of entry, might alleviate the agency’s competitive concerns. The FTC, however, distinguished the case at hand from prior decisions where it concluded that no anticompetitive effects were likely on the basis that in Oregon, no alternative sources of title information beyond proprietary title plants existed. In addition, the agency found the costs of entering the title insurance underwriting business to be higher in Oregon due to the requirement that underwriters own interest in a title plant, as opposed to merely purchasing title information from a third-party. The FTC also noted that price regulation in Oregon was not sufficient to address its concerns regarding potential competitive harm, based on evidence showing that competition between underwriters occurred on non-price dimensions, such as service).


[9] Supra note 2, at 3.

[10] Id.


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