THE NATIONAL LAW REVIEW

Published May 19, 2020 at NatLawReview.com

What Bankruptcy Counsel Need to Know About Antitrust Law: Nothing Is Free and Clear

By Jennifer M. Oliver

While bankruptcy is no one's idea of a dream, the beauty of the U.S. Bankruptcy Code is that it makes a business failure less of a nightmare for debtors and creditors alike. Litigation is stayed. Debts are put on hold. Assets of the estate may be purchased — once certain conditions are met — "free and clear."

But, like anything, especially when it comes to law, details are a tricky thing. That applies especially to the nuanced practice of antitrust law. Are court-ordered asset sales under Section 363 of the Bankruptcy Code insulated from Clayton Act Section 7 exposure? You might think so, and most of the time asset sales are not challenged. Section 363 protects what are considered final sales. After all, when you purchase a bankrupt company's assets you want to be sure you aren't buying legal problems.

After meeting specific requirements and clearing certain exceptions, a trustee may sell property of a bankrupt company. If notice is required by Section 7A of the Clayton Act, the trustee must notify the Federal Trade Commission and the Antitrust Division of the Department of Justice. Time limits are set.

So, there are hurdles to clear before a sale is free and clear, and establishing that the sale is not anticompetitive — even if the showing is not required — should be one of them to avoid problems down the line.

Antitrust Does Not Take a Back Seat to Bankruptcy

An article published in the American Bankruptcy Institute Journal in 2004 put it this way: "Frequently, bankruptcy practitioners view the bankruptcy laws as a sort of trump card that nullifies other requirements in the law. Generally, once a firm files for bankruptcy, other proceedings are stayed or consolidated in the bankruptcy court, and the court and the debtors-in-possession have substantial power to control what happens next. The antitrust laws, however, do not take a back seat to the bankruptcy laws, and a basic knowledge of how the antitrust laws could affect a bankruptcy can be essential to avoiding pitfalls."

The ABI article details two areas where bankruptcy law and antitrust law intersect. “First, to the extent a debtor or the bankruptcy estate seeks to sell all or part of the assets subject to the bankruptcy, the antitrust laws may require a premerger review by the U.S. government to determine if there are any anti-competitive effects possible from the bankruptcy sale. Second, creditors or other participants in bankruptcy proceedings may violate the antitrust laws by acting anti-competitively.” Sharing of pricing information is one example of anticompetitive behavior. While it wouldn’t normally be an issue when purchasing assets of a non-competitor, doing so with a competitor is an obvious problem under antitrust law.

In a 2015 article, attorneys Todd R. Seelman and John Cardinal Parks of Lewis Brisbois Bisgaard & Smith LLP also raised the specter of antitrust liability in the context of buying assets through the bankruptcy process.

“Notwithstanding the protections provided in Section 363 bankruptcy sales, an asset purchaser may nevertheless be subject to antitrust liability and, in certain circumstances, a divesture order,” they wrote. “While Section 363 orders shield against challenges to the buyer’s right to ownership of the bankruptcy assets, antitrust liability may arise from the bankruptcy sale’s impact on competition. Bankruptcy courts have not historically addressed antitrust liability in ruling on Section 363 sales.”

All Deals Are Subject to Antitrust Scrutiny

Seelman and Parks cited decisions that show that buyers of these assets have, in fact, faced antitrust liability. Buyers in the cases are not insulated from antitrust claims just because a sale was approved under Section 363, they said. One of those cases, *In Re Gulf States Steel*, 285 B. R. 497 (Bankr. N.D. Ala. 2002), involved the purchase of steel mill assets by Gadsden Industrial Park LLC, a competitor to the newly formed Gulf States Reorganization Group. Gadsden won the bid, but the $6.3 million sale fell below the amount that would require government review. Gulf States Reorganization Group later sued Park and others under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. A district judge ruled for Park, finding that Gulf States didn’t prove “antitrust injury.” The Eleventh Circuit reversed and 12 years later the Supreme Court declined to review the case. “Gulf States Steel stands for the proposition that a sale of assets under Section 363 of the Bankruptcy Code – which were not reportable under HSR – are nonetheless subject to antitrust scrutiny,” Seelman and Parks wrote.

The authors also pointed to Section 7 actions brought by the government that successfully challenged transactions outside the bankruptcy arena. Deals were later unwound because they caused competition-killing market concentration. The FTC recently reminded us that it is not timid when it comes to unwinding deals. It recently sued to unwind tobacco giant Altria’s $12 billion investment in vaping competitor Juul. Last year it successfully unwound the merger of two prosthetic makers — Otto Bock HealthCare and Freedom Innovations — based on the harm done when a dominant player buys out a market disruptor.

Seelman and Parks emphasized that an asset sale between competitors — whether or not the deal was reportable under Hart-Scott-Rodino — can present antitrust problems. “If the stakes are high enough, consideration should be given to putting on evidence that the proposed purchase lacks any anticompetitive effect at the asset sale hearing. Doing so, however, involves several practical difficulties and raises legal issues that may bog down the sale process and discourage even the most intrepid of buyers. Not doing so, on the other hand, raises the risk that the bankruptcy sale will subject the buyer to antitrust liability or, even worse, cause a forced divestiture of the purchased assets.”

Beware of Creditor-Competitors

Participation on a creditors’ committee also may present the opportunity for competitors of the debtor to act anticompetitively. For instance, the creditor/competitor may seek to delay the debtors’ exit from bankruptcy or use the bankruptcy process to otherwise reduce the competitiveness of the debtor, either before or after exit from bankruptcy.

The FTC has taken action where companies have used their position on a creditors' committee to hurt competitors who are in bankruptcy. *In re AMERCO*, 109 F.T.C. 135 (1987). In this case, U-Haul/AMERCO was a legitimate member of a creditors' committee in Jartran's bankruptcy. Jartran and U-Haul both competed in the "one-way rental market," although U-Haul had dominated that market for at least 10 years.

As a member of the creditors' committee, U-Haul proposed several actions that "were inconsistent with U-Haul's legitimate interests as a creditor, and in fact were intended primarily to delay or prevent Jartran's reorganization as a competitor." Id. These actions included opposing a settlement between the purchaser of Jartran's stock and the creditors. This settlement would have increased the distribution from the bankruptcy estate to U-Haul. U-Haul sought to void the acquisition of Jartran, although the acquisition provided financial support to Jartran that "was necessary for Jartran's survival." Id. U-Haul also sought to have the reorganization plan vote resolicited and delayed confirmation of Jartran's reorganization plan.

After the FTC filed suit, U-Haul agreed to a consent decree that restricted its future ability to participate in bankruptcy proceedings. It was not allowed to participate in bankruptcy proceedings involving its competitors, and it was prohibited from initiating or participating in judicial or administrative proceedings against any competitor without prior notice to the FTC. While this case is 15 years old, the recently departed chairman of the FTC discussed it in a speech in 2002, and the issue could arise at any time if competitors are using the bankruptcy process to gain a competitive advantage.

A Low Risk That Can't Be Ignored

Practitioners should counsel clients to keep their antitrust compliance training in mind even during the stress of bankruptcy proceedings; antitrust collusion is illegal regardless of a firms' financial status.

But in practical terms, the risk that a Section 363 sale will be challenged as anticompetitive is usually low. Even in deals that result in a high degree of market concentration, where a company (1) is in danger of imminent business failure, (2) cannot reorganize successfully in bankruptcy, and (3) made unsuccessful good faith efforts to find alternative purchasers, parties may assert the "failing firm" defense to a Clayton Act challenge. But prong three is key in this context: if there is another potential purchaser that poses less competitive risk, that avenue must be explored. Likewise, bankruptcy practitioners muse be cognizant of HSR filing thresholds and CFIUS concerns, regardless of whether the merger is the result of a section 363 sale.

Consider the long-term policy outlook. Antitrust enforcers have historically refused to expand the scope of the failing firm defense in the wake of economic downturn for good reason: economic crises often result in rapid market consolidation. And while economic conditions are expected to see peaks and valleys in the course of a generation, outsized market power and concentration harm consumers over the long-term and is difficult to reverse.

■

Edited by Tom Hagy for MoginRubin LLP.

The Author

Jennifer M. Oliver | Partner

Based in San Diego, Ms. Oliver focuses on antitrust, complex business, and investment litigation, and shares her expertise in the context of mergers and acquisitions. She is also a certified information privacy professional. Ms. Oliver's past and current clients are among the leading corporations in the entertainment, financial, manufacturing, transportation, technology, and publishing sectors.

Education:
The University at Buffalo, J.D.
The University at Buffalo, MBA
The University at Buffalo, B.A. Business

Phone: +1 619.687.6611
Email: joliver@moginrubin.com

MoginRubin is a leading antitrust and competition law boutique skilled at litigation, strategic counseling, and policy advocacy, with additional expertise in privacy law and mergers and acquisitions.

San Diego: +1 619.687.6611
Washington, DC: +1 202.630.0616
Website: MoginRubin.com
Blog: MoginRubin.com/category/blog