

What Bazaarvoice Tells Us About Section 7 Litigation

Law360, New York (January 14, 2014, 9:33 PM ET) -- On Jan. 8, 2014, the U.S. Department of Justice prevailed in its challenge to Bazaarvoice's consummated \$168 million acquisition of PowerReviews.[1] The United States District Court for the Northern District of California held that Bazaarvoice's June 2012 deal constituted the purchase of its "closest and only serious competitor" and violated Section 7 of the Clayton Act.[2]

In reaching its decision, the court thoroughly applied the 2010 horizontal merger guidelines and relied heavily on premerger "hot documents" that reflected closeness of competition between the merged parties and an anti-competitive deal rationale. Bazaarvoice demonstrates that Section 7 defendants may find it very difficult to overcome an abundance of negative premerger documents with expert economic testimony or customer testimony at trial.

Bazaarvoice joins 2011's H&R Block[3] on the DOJ's list of successfully litigated challenges to mergers. These prominent trial victories, along with several other recent merger challenges that ended short of trial, highlight the DOJ's current aggressive enforcement stance and its ability to intervene in mergers.

Background

Bazaarvoice creates and markets online product reviews and ratings platforms (R&R), which allow Internet retailers to embed such reviews on their websites. PowerReviews, which was a privately held corporation, engaged in the same business until the time of acquisition.[4] The parties did not file an HSR form with the government prior to the merger because the deal's value was below the statutory reporting thresholds.

Days after the merger closed, the DOJ began a Section 7 investigation. The DOJ built much of its case around a series of premerger Bazaarvoice documents describing the transaction in terms consistent with the allegation that Bazaarvoice sought, through the acquisition of PowerReviews, to lessen competition in the United States R&R market. On Jan. 10, 2013, the DOJ filed suit seeking an injunction that would require Bazaarvoice to divest sufficient assets to create a new R&R competitor comparable to PowerReviews.[5]

The trial proceedings included depositions of 104 Bazaarvoice customers, testimony from numerous executives of both companies, and economic analysis from both the DOJ and the two parties. On Jan. 9, 2014, the court issued a redacted public version of its opinion finding against Bazaarvoice on the issue of liability, but leaving consideration of the remedy for a later date.[6]

The Opinion

The court spent a great deal of its opinion discussing Bazaarvoice's rationale for acquiring PowerReviews before turning to market definition and market concentration.

The court determined that Bazaarvoice's premerger rationale for pursuing the transaction was much different than the rationale Bazaarvoice presented at trial. "Hot documents" were the focal point of the DOJ's trial case and the court liberally cited these documents in its opinion.[7] The court noted that "[w]hile Bazaarvoice fought against every material argument of the government, its defenses were often undermined by pre-acquisition statements from its and PowerReviews's executives," showing that "Bazaarvoice's management believed that the purchase of PowerReviews would eliminate its only real competitor." [8]

For example, premerger documents noted that the transaction would "[e]liminate [Bazaarvoice's] primary competitor" as well as "reduc[e] comparative pricing pressure." [9] The court pointed to a plethora of premerger documents reflecting that Bazaarvoice viewed the market as a duopoly and that the primary benefit to the merger would be a reduction in competition.

The court next performed a structural market analysis, defining the relevant markets and assessing market concentration. Notably, the court acknowledged in dicta that market definition might not be necessary under Section 7, citing to the 2010 guidelines, [10] but proceeded to define relevant product and geographic markets. Accepting the markets proposed by the DOJ, the court defined the relevant product market as R&R and the relevant geographic market as the United States. [11] In defining the relevant markets, the court relied upon the 2010 Guidelines' "hypothetical monopolist" test. [12]

The court found a prima facie violation based on Bazaarvoice's high post-merger market share and market concentration. [13] The DOJ estimated that Bazaarvoice's post-merger R&R share of the top 500 internet retailers was 68 percent, and post-merger R&R revenue was 83 percent, both of which the court found warranted a presumption of anti-competitive effects. [14]

The court also credited the DOJ economist's use of Herfindahl-Hirschmann Index figures, as called for in the 2010 guidelines, to establish that the merger created a presumption of substantial post-merger reduction in competition. [15] At trial, Bazaarvoice objected to the DOJ's characterization of premerger market shares and described PowerReviews as a weak competitor. However, the court pointed to the many premerger documents reflecting close competition between the parties and noted that Bazaarvoice's position was "often undermined by pre-acquisition statements from its and PowerReviews' executives." [16]

Bazaarvoice claimed that the acquisition was intended to strengthen the combined firm's ability to compete in the broader online commerce market and that "architectural improvements" and syndication of content across customers resulting specifically from the transaction would create efficiencies benefiting competition after the merger. The court held that Section 7 prevents such attempts to obtain competitive "breathing space" in one market to expand into others. [17] The court also found that none of Bazaarvoice's proffered benefits were specific to the transaction or could not be done on a standalone basis. [18]

The court rejected Bazaarvoice's contention that all 104 customers deposed had not complained about the merger. The court noted that Bazaarvoice may have mitigated any anti-competitive post-merger behavior in light of the DOJ's investigation, [19] and that each customer negotiates price individually and is therefore unlikely to have the appropriate view of the market needed to assess whether the merger harmed it. [20] The court instead credited the DOJ expert's testimony that the deal likely would result in anti-competitive effects, suggesting that the customer testimony was not necessarily a valid proxy for the likelihood of competitive effects. The court also rejected Bazaarvoice's citation to post-merger evidence as a means of showing that the merger had not been anti-competitive. [21]

The court was not swayed by Bazaarvoice's contention that actual or prospective entrants such as Amazon.com Inc., Facebook Inc. or Google Inc. would mitigate anti-

competitive effects. The court found that Bazaarvoice “gave no reason why those firms were likely to enter the market” and that “syndication, switching costs, intellectual property/know how, and reputation are formidable barriers to new firms entering the market for R&R platforms and to existing R&R providers expanding their operations to replace the competition previously provided by PowerReviews.”[22]

Finally, the court rejected Bazaarvoice’s contention that a Ninth Circuit case, *United States v. Syufy Enterprises*,^[23] necessitated an “alternative methodology” to the traditional burden-shifting paradigm of antitrust review where consummated transactions are involved. The court distinguished *Syufy* as turning on the very low barriers to entry in the post-merger market — a contention that it had rejected already with regard to Bazaarvoice.

Implications

Following the DOJ’s 2011 trial success in *H&R Block*, Bazaarvoice represents the second litigated case resulting in a court decision that applied an analytical framework closely following the 2010 horizontal merger guidelines, and both trial victories will serve as precedent against future Section 7 defendants.

The cases are somewhat different in terms of market dynamics and theories of harm — *H&R Block* involved a 3-to-2 merger and both coordinated and unilateral effects, while Bazaarvoice was litigated as a 2-to-1 merger and a unilateral effects theory of harm. However, the courts in both cases thoroughly applied the 2010 guidelines throughout their analyses.

In both decisions, the courts found a presumption of anti-competitive effects in accordance with the 2010 guidelines and case law and used the 2010 guidelines’ recommended framework for analyzing the competitive effects of mergers.^[24] Both courts also endorsed and credited the use of expert economic analysis to support findings of likely anti-competitive effects.

Bazaarvoice reflects the critical role business documents can play in Section 7 litigation. During trial, the DOJ focused heavily on “hot documents,” and the court cited these documents throughout its opinion. Bazaarvoice’s expert testimony, purported rationale for the acquisition and customer testimony could not overcome the implications of the premerger documents suggesting that PowerReviews was the only meaningful competitor to Bazaarvoice and that the deal would lessen competition.

The court’s focus on documentary evidence and discounting of the defendant’s economic testimony reflects a dichotomy between defending mergers in court and defending mergers before the antitrust agencies. The critical evidentiary focus in merger defense at the agency level likely will differ from the evidentiary focus before a federal court. Merging parties should consider that the DOJ may place greater emphasis on economic analysis and actual market dynamics than on documents in deciding whether transactions are likely to be anti-competitive. On the other hand, courts may tend to view documentary evidence as critical, notwithstanding economic testimony to the contrary.

This dichotomy between merger review at the agencies and merger review in court takes on increasing importance given the DOJ’s recent series of aggressive enforcement actions that derailed, delayed or altered transactions without proceeding to trial: *United States v. AT&T Inc.*,^[25] *United States v. Anheuser-Busch InBev SA/NV*^[26] and *United States v. U.S. Airways Group*.^[27]

Bazaarvoice also reflects the willingness of the DOJ and the Federal Trade Commission to challenge consummated mergers that are not reportable under Hart-Scott-Rodino. Thus, notwithstanding the fact that a contemplated transaction does not meet the HSR reporting thresholds, parties must be aware of the statements contained in their internal documents, particularly those that present the commercial rationale for the transaction.

Finally, the case presents a significant win for the DOJ in a dynamic, technology-based market. This is especially true given the DOJ's loss at trial in its 2004 challenge to the Oracle/PeopleSoft transaction. The court acknowledged the debate surrounding the role of antitrust law in rapidly changing technology markets, but concluded that Bazaarvoice did not present evidence to show why the dynamic aspects of the market would prevent the merger's anti-competitive effects.[28]

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[1] U.S. v. Bazaarvoice Inc., 13-cv-00133-WHO, slip op. (N.D. Cal., Jan. 8, 2014).

[2] 15 U.S.C. § 18.

[3] U.S. v. H&R Block, Inc., 833 F.Supp.2d 36 (D.D.C. 2011).

[4] See Bazaarvoice, slip op. at 10-11.

[5] Id. at 4; see also Complaint at 20, U.S. v. Bazaarvoice Inc., 13-cv-00133-WHO (N.D. Cal., Jan. 8, 2014).

[6] Bazaarvoice, slip op. at 1-10.

[7] Id. at 36-41.

[8] Id. at 9.

[9] Id. at 32.

[10] Id. at 54.

[11] Id. at 124-127.

[12] Id. at 54-55.

[13] Id. at 127-130.

[14] Id. at 128.

[15] Id. at 68.

[16] Id. at 9.

[17] Id. at 7.

[18] Id. at 135-36.

[19] Id. at 136.

[20] Id. at 8.

[21] Id. at 136-38.

[22] Id. at 133.

[23] 903 F.2d 659 (9th Cir. 1990).

[24] See, e.g., H&R Block, 833 F.Supp.2d at 71.

[25] Complaint, 11-cv-01560 (D.D.C. Aug. 31, 2011).

[26] Final Judgment, 13-cv-00127 (D.D.C. Oct. 24, 2013).

[27] Proposed Final Judgment, 13-cv-01236 (D.D.C. Nov. 11, 2013).

[28] Bazaarvoice, slip op. at 141.