OUTSIDE COUNSEL

BY MATTHEW L. CANTOR

Connecticut's Bid to Stop an Oracle/PeopleSoft Deal

Connecticut Attorney General Richard Blumenthal recently filed an antitrust suit seeking to block the renewed hostile bid for PeopleSoft, Inc. by the Oracle Corporation. According to Connecticut's complaint, if consummated, a merger between Oracle and PeopleSoft will substantially lessen competition in various markets for enterprise software from three major players to two, leading to higher prices for such software.

The complaint defines enterprise software as "computer application program[s] designed for and used by ... large business[es], governmental unit[s] or institution[s] generally employing ten thousand or more employees or with an annual revenue of at least $2 billion."

The complaint also notes that it is unlikely that any potential competitor in the asserted market will enter to constrain the pricing of software offered by a combined Oracle/PeopleSoft entity.

'Poison Pill' Provision

This suit was filed before the PeopleSoft board of directors formally rejected the renewed bid and even though a substantial condition apparently necessary to consummating the transaction — the repeal of PeopleSoft's "poison pill" provision — has yet to be fulfilled.

The suit was also filed well before federal antitrust authorities have completed their review of the proposed deal.

While it is not unusual and it is certainly legal for Connecticut to exercise its jurisdiction to sue separately from the federal government in an antitrust case, there are few instances where an antitrust enforcer has sought to block a merger before the transaction has been agreed to by the target's board — especially a board like PeopleSoft's, which apparently holds an effective veto over the transaction — or its shareholders. The unusual timing of the lawsuit thus raises several questions that merger and acquisition counsel may wish to consider when contemplating hostile transactions.

Does Connecticut have the right to bring this lawsuit independent of federal agencies? Absolutely. The federal antitrust laws confer standing upon each and every state. Moreover, Connecticut has brought this lawsuit not only under federal antitrust law, but under a Connecticut antitrust statute that prohibits contracts that restrain trade. State standing to bring actions independent of federal authorities was reaffirmed in the recent *Microsoft* case, where the district judge presiding over the settlement confirmed that states have the right to settle antitrust suits on terms different than those agreed to by the federal government.[1]

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Questionable Right

Does Connecticut have the right to bring this lawsuit at this time? Maybe. As a general proposition, antitrust enforcers need not await formal acceptance of an unsolicited bid by the target or its shareholders as a prerequisite for suit. However, Connecticut has brought this lawsuit under Section 16 of the Clayton Act, which states that governmental entities may sue for injunctive relief "against threatened loss or damage by a violation of the antitrust laws."

Whether this hostile bid for acquisition rises to a "threatened loss" for Connecticut, its economy or its citizens, in light of PeopleSoft's apparent effective veto, will be for the court to decide.

Further, it is not clear whether this specific case represents a ripe antitrust "case or controversy" for adjudication under Article III of the U.S. Constitution. That section empowers courts to only adjudicate those matters where loss has or is likely to occur: Matters are not justiciable if they only concern possible or theoretical harm.

Does the lawsuit have merit? This will depend on whether Connecticut can present economic evidence demonstrating that a merger between Oracle and PeopleSoft will likely lead to higher prices, reduced output or lower incentives to innovate for enterprise software. In order to do this, Connecticut will have to demonstrate that the pricing of other software does not constrain the pricing of enterprise software.

Connecticut has anecdotal evidence to rely upon in the form of PeopleSoft's admission that an Oracle/PeopleSoft merger would present antitrust concerns. Certainly, this was no mere negotiating tactic on the part of PeopleSoft to have Oracle raise its bid. The per share price elicited for a PeopleSoft sale of its equity will have no relevance to whether a proposed Oracle/PeopleSoft merger is illegal.

What are Connecticut's possible motivations? Connecticut has just entered into a contract with PeopleSoft for over $100 million for the purchase of enterprise software. As alleged in the complaint, if it is forced to migrate to Oracle products, Connecticut will have to spend considerably more. Accordingly, Mr. Blumenthal, while seeking to protect the consumers of Connecticut, is also bringing this lawsuit in order to protect the interests of the Connecticut state government as a purchaser.

Mr. Blumenthal may also be hoping to pressure federal authorities to bring suit here.

Unless these federal authorities find Connecticut's characterization of the relevant market to be meritless,

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they will be faced with a difficult political situation if they do not bring an anti-merger suit where a duopoly situation will essentially arise as a consequence of this transaction.

This is especially so when one considers that an important federal appellate court has recently noted that, where barriers to entry are high, no merger to duopoly has ever passed judicial antitrust muster.[2]

Further, in order to stem off any criticism that it has shirked its prosecutorial responsibilities — as it did when it permitted New York Attorney General Elliot Spitzer to lead the recent crackdown on Wall Street — the federal government may wish to prevent Connecticut from taking the lead in this high-profile matter.

Daily columns in the *Law Journal* report developments in laws affecting medical malpractice, immigration, equal employment opportunity, pensions, personal-injury claims, communications and many other areas.

In order to convince shareholders to sell and to further pressure the PeopleSoft board, Oracle may attempt to dismiss the Connecticut case as non-justiciable.

Indeed, it has been reported that other state attorneys general are already seeking to join the Connecticut lawsuit, a move that would place even further pressure on federal antitrust authorities.

How will the filing of the Connecticut suit affect the positions of Oracle and PeopleSoft? The suit provides cover to the PeopleSoft board, who rejected the renewed Oracle bid and is seemingly attempting to derail it via the implementation of its "poison pill."

The PeopleSoft board, already facing a suit for allegedly breaching its fiduciary duties to its shareholders in Delaware court, will have to justify its rejection of the significant offer from Oracle, which currently includes a significant premium for PeopleSoft shares.

The rejection of the renewed bid in light of an antitrust lawsuit already filed by the Connecticut attorney general gives the PeopleSoft board ammunition to fight off shareholder discontent. Further, Oracle will have a more difficult time spurring PeopleSoft shareholders to fight their board in light of a legitimate antitrust suit by Connecticut concerning the transaction. Indeed, in order to convince shareholders to sell and to further pressure the PeopleSoft board, Oracle may attempt to dismiss the Connecticut case as non-justiciable.

It will certainly be interesting to see if, in light of Connecticut's opposition, Oracle will continue with its pursuit of this transaction. Transactional and antitrust counsel should certainly continue to follow its developments, as this case may serve as precedent for future antitrust enforcement efforts.

(1) *State of New York v. Microsoft*, 209 F. Supp.2d 132 (D.D.C. 2002).

(2) *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001).