

## Antitrust Alert

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### DOJ Assistant Attorney General William Baer's First Merger Challenge Confirms Continued Aggressive Merger Enforcement by Antitrust Division

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On January 31, 2013, the Antitrust Division of the Department of Justice ("DOJ") filed its first lawsuit challenging a merger under newly sworn-in Assistant Attorney General, William J. Baer. Both the facts and circumstances surrounding the suit confirm that the Antitrust Division under Baer's leadership will maintain its aggressive merger enforcement program.

The DOJ challenged Anheuser-Busch Inbev's ("ABI") \$20.1 billion proposed acquisition of competitor Grupo Modelo ("Modelo"), claiming that it would lessen competition in the market for beer in the United States as a whole as well as in 26 metropolitan areas, resulting in increased beer prices and decreased options. ABI and Modelo, respectively the largest and third largest beer firms, together control about 46 percent of U.S. sales. MillerCoors, the second largest beer firm, accounts for approximately 29 percent of nationwide sales. Last year, beer accounted for \$80 billion of consumer spending.

The gravamen of the DOJ's challenge was that Modelo was the most aggressive pricer among the three big brewers, and that internal documents acknowledge Modelo acted as a restraint on ABI's ability to raise prices. In its complaint, the DOJ alleged that while ABI has instituted an annual price increase, typically followed by MillerCoors and others, Modelo has maintained its aggressive pricing strategy which even ABI admits pressures ABI to refrain from increasing its prices. The DOJ further alleged that ABI instituted its increases as part of a conduct plan which aims to provide for the highest possibility of sustaining its price increases while maintaining its market share. Elimination of the competition from Modelo, the DOJ argued, would enable ABI to further raise its prices, enhance its market share, and facilitate coordinated pricing with the remaining producers. According to the DOJ, because of the market's size and concentration, even a small increase in the price of beer could result in billions of dollars of harm to U.S. consumers.

The DOJ also asserted that absent the acquisition, consumers would see more innovation and choice as a result of ABI's efforts to compete with Modelo. Specifically, ABI had allegedly been targeting its efforts to compete with Modelo's Corona, which it perceived as a significant threat, by creating new and redesigned products. Absent this competitive threat, claimed the DOJ, ABI would abandon its innovative efforts and consumers will see higher prices and less innovation.

The run-up to the filing of the litigation also provides additional insight into the DOJ's current aggressive merger stance. Perhaps incited by the \$650 million break-up fee in the transaction, ABI apparently had unsuccessfully offered to enter into a consent decree by selling a portion of Modelo's interests and instituting a corresponding temporary supply agreement. Mr. Baer noted that the remedy did not go far enough for the DOJ, as ABI would be able to end the deal after 10 years and would not divest any of Modelo's brands or bottling facilities. According to press accounts, the parties were in negotiations through the evening of January 30, when the DOJ walked away and filed suit the next day.

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