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DOJ Shows Flexibility, Creativity in Settling Biotech Merger

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A recent settlement in a biotech merger case may signal a greater willingness by DOJ to accept remedy provisions it previously would have rejected, especially to resolve vertical issues in industries heavily dependent on intellectual property and innovation. Rather than challenge Monsanto's proposed acquisition of Delta and Pine Land Company, DOJ agreed to a settlement that departs from some of its traditional policies and practices regarding merger remedies. The announced remedy: (1) assembles a new competitor with a package of assets, tangible and intangible, drawn from both merging parties; (2) contains both structural and conduct relief; (3) contemplates divestitures to multiple third parties; (4) permits Monsanto to retain rights in divested assets; and (5) contains a "crown jewel" provision.

On May 31, 2007, the Department of Justice announced a settlement that permits Monsanto Company to proceed with its proposed $1.5 billion acquisition of Delta and Pine Land Company ("DPL"). http://www.usdoj.gov/atr/cases/monsanto.htm Both companies are major competitors in the development, commercialization, and sale of "traited" cottonseeds in the southern United States, where most of the domestic cotton crop is grown. Together, DPL and Monsanto account for 95% of the traited cottonseed sold in that region. Traited cottonseeds contain biotech traits that protect the crop from damage from insects and weeds.

DPL is by far the industry leader in sales of traited cottonseeds. Monsanto, which sells traited cottonseeds through its Stoneville Pedigreed Seed Company subsidiary, is a distant second. Conversely, Monsanto is the clear industry leader in trait development, in which DPL is not involved. Over 96% of traited cottonseeds contain Monsanto traits.

Although the merger presented some horizontal overlap issues—seed breeding and sales— those could have been resolved with a standard "trade-up" remedy whereby Monsanto would acquire the larger DPL, and divest its smaller Stoneville subsidiary. Because that did not occur, it is likely that DOJ was more concerned with the vertical aspect—that the merger of the dominant seed breeder/marketer with the dominant trait developer could stymie biotech trait R&D and innovation by Monsanto's rivals. As DOJ explained: "The proposed transaction would also eliminate DPL as a partner independent of Monsanto for competing trait developers, thereby substantially delaying or preventing the development and introduction of cottonseed containing non-Monsanto traits." Competitive Impact Statement ("CIS") at 5.

DOJ viewed DPL's role in promoting trait competition and innovation as not only important, but perhaps unique:

> Trait developers consider DPL an attractive partner for two reasons. First, DPL is in a strong position to introduce new trait technologies due to its extensive breeding programs, elite germplasm collection, technical service capabilities, know-how, brand recognition, and market position. Second, DPL's trait licenses with Monsanto allow DPL to offer competing trait developers the ability to combine or "stack" their traits in DPL cottonseed with Monsanto traits. . . . . Monsanto's trait licenses with cottonseed companies other than DPL severely restrict the ability of those companies to work with other trait developers, with some licenses prohibiting

stacking of Monsanto's traits with another company's trait.

CIS at 8.

Given its expressed concern about the competitive role of DPL, it is significant that DOJ, rather than challenging the acquisition outright, was willing to assemble a new seed company designed to fulfill the trait development role DPL had played pre-merger. The new company will be larger than Stoneville and have more innovation-related assets, but will fall short of replicating the pre-merger DPL. Also significantly, DOJ did not require the new competitor's access to intangible assets to be exclusive; Monsanto is permitted to retain access to much of the IP as well.

The Divestiture Package

Starting with Stoneville, assets were added from both DPL and Monsanto to create what DOJ called the "Enhanced Stoneville Assets":

1. From Monsanto:

- Licenses for Monsanto's two key commercialized traits — Roundup Ready and Bollgard – on terms as favorable as those of DPL's premerger licenses; and
- Developmental germplasm and technology (in addition to Stoneville's germplasm).

2. From DPL:

- "Delta Pearl," the parent of DPL's most popular cottonseed variety;
- Twenty lines of DPL's "elite" conventional germplasm; and
- Twelve of DPL's most promising developmental germplasm lines.

DOJ's goal in augmenting Stoneville's assets was to create "a significant base of current and developmental varieties that would be attractive to trait developers looking to introduce traits into cottonseed" and to give the new company "capabilities that exceed those of Stoneville and a foundation on which to replicate the platform for trait development and commercialization that DPL previously provided." CIS at 13. Clearly, DOJ realized that it would take time if the new company were to replicate DPL's trait development platform.

Shared Access to Intellectual Property

The consent decree permits Monsanto to retain access to much of the intellectual property contributed by it and DPL to the "Enhanced Stoneville Assets," particularly research rights to divested germplasm. According to DOJ, shared rights were permitted where germplasm research was relevant to both breeding and trait development, or needed by Monsanto to preserve DPL's present and future competitiveness. CIS at 14-17.

The "Crown Jewel" Provision

Perhaps recognizing that the "Enhanced Stoneville Assets" have not been "market-tested" as an effective replacement for DPL, the consent decree contains a "crown jewel" provision, which the DOJ normally "strongly disfavors." The crown jewel provision requires Monsanto to divest all of DPL (the "crown jewel") in the event that a suitable divestiture buyer cannot be found for the "Enhanced Stoneville Assets" within the time period (no more than 150 days) allowed by the decree.

The Conduct Remedy Provision

The settlement also requires Monsanto to modify all of its third-party trait licenses to allow Monsanto traits to be combined ("stacked") with non-Monsanto traits by the licensees. These license revisions are intended to place other seed companies on the same footing with Monsanto that DPL had pre-merger, a key reason trait developers considered DPL to be a good development partner.

Supplemental Divestiture

Finally, the decree requires Monsanto to divest the so-called "VipCot Assets" to Syngenta Crop Protection AG. The purpose of this additional divestiture to a specified buyer is "to minimize any delay the acquisition could cause in the commercialization of cottonseed containing VipCot, Syngenta's insect-resistant trait technology that would compete against Monsanto's Bollgard family of traits." CIS at 19. The VipCot Assets include 43 lines of DPL germplasm into which VipCot has been incorporated, along with performance data and other information.

Implications

This case suggests a possible new flexibility by DOJ in fashioning merger remedies. Some of the features in the remedy are not only uncommon, they depart from general policies set forth in DOJ's 2004 "Antitrust Division Policy Guide to Merger Remedies" ("Remedy Guidelines"):

- "Divestiture of an Existing Business Entity Is Preferred," because the viability and competitive effectiveness of an existing company have been tested by the market. Remedy Guidelines at III.C. *But see* Caveat 1: Smaller divestitures may be acceptable "in limited circumstances."
- "Conduct Relief Is Appropriate Only in Limited Circumstances," *id*. at III.E, but the "limited circumstances" described in the Remedy Guidelines do not appear applicable here.
- "Crown Jewel Provisions Are Strongly Disfavored," *id* at III.H. ("The Division disfavors the use of crown jewel provisions because generally they represent acceptance of either less than effective relief at the outset or more than is necessary to remedy the competitive problem.")
- "[I]n the context of a merger, permitting the merged firm to retain access to the critical intangible assets may present a significant competitive risk," *id.* at III.D.

Although none of the above principles articulated in the Remedy Guidelines is inviolable, and every situation depends on the facts at hand, the number of departures in this case from the preferences set forth in the Remedy Guidelines suggests that the government may be willing to work more cooperatively with merging parties in cases involving innovation and technology issues.