

“SELL” MEANS SELL, EVEN IN A DEPRESSED MARKET:
DOJ AND COURT REQUIRE ACQUIRING PARTY TO
COMPLETE ANTITRUST DIVESTITURE

April 13, 2009

To Our Clients and Friends:

A recent decision by the U.S. District Court for the District of Columbia has held that the slowdown in the M&A market and resulting difficulty in finding a buyer at what the seller regards as a reasonable price, does not provide a basis for delaying a divestiture required under an antitrust consent order. *U.S. v. Signature Flight Support Corp.*, Civ. Act. No. 08-1164 (D.D.C. Mar. 23, 2009). The court agreed with the Department of Justice that the recent economic downturn did not constitute the “changed circumstance” required to modify the consent order.

In February 2008, Signature Flight Support Corporation contracted to purchase certain “fixed base operations” (“FBOs”), which include fueling, hanger rentals and other services for aviation customers. On July 3, 2008, following the Antitrust Division’s investigation and objection to certain aspects of the transaction, the DOJ filed a complaint challenging the acquisition, together with a consent judgment under which Signature agreed to divest one of the two FBOs it would own post-merger at the Indianapolis Airport. Signature was required to complete the divestiture within the later of 90 days after filing of the complaint or five days after entry of the final judgment, which the DOJ extended to December 10, 2008.

Signature had difficulty disposing of the Indianapolis FBO for what it regarded as a reasonable price. The parties had allocated \$25.9 million of the purchase price to the Indianapolis facility, and Signature claimed that it received initial bids of up to \$20 million in September 2008. However, several bidders dropped out, and the only two remaining bids were for \$7 million and \$5 million. When the Antitrust Division insisted that Signature complete the divestiture as scheduled, Signature moved the court to modify the terms of the consent judgment. Signature argued that applying the original deadline for divestiture was inequitable in view of the economic downturn.

Siding with the DOJ, the district court held that the order should not be modified. The court found that the parties had allocated the risk of difficulties in divestiture to Signature, noting the consent judgment’s provision that “defendants will later raise no claim of hardship or difficulty as grounds for modification.” The court held that Signature’s complaint that “selling the [asset] to one of the current bidders would bring in a far lower sales price than [the seller] had originally hoped for” was “a problem that does not constitute

a changed circumstance necessary to modify a final judgment.” The court also noted that delaying the divestiture “would only increase” the risk that the acquisition would have an anti-competitive effect. Pursuant to the terms of the consent order, the court ordered the appointment of a trustee to sell the asset.

There has been much speculation as to whether the economic downturn will affect standards for antitrust review of mergers, especially those involving troubled companies. That remains an unanswered question, with some commentators suggesting that standards for invoking the “failing firm” defense may be loosened or interpreted to consider business adversity arising from lack of access to sources of financing. However, the implications of Signature’s experience are clear: companies agreeing to divestitures must be prepared to live with what they agree to, even if economic conditions make a forced sale financially unpalatable.

Please contact us if you have any questions.

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