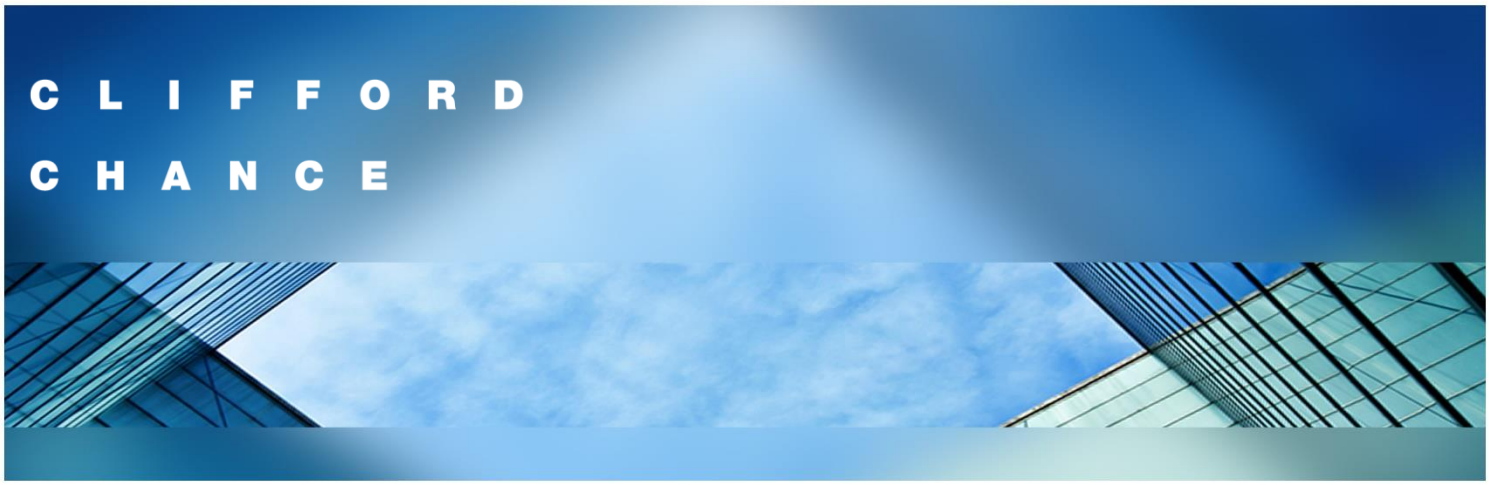

NO DEAL, EVEN IF CONSUMMATED, IS FREE FROM ANTITRUST SCRUTINY: FTC UNANIMOUSLY UPHOLDS DECISION AGAINST OTTO BOCK HEALTHCARE'S ACQUISITION OF FREEDOM INNOVATIONS

Almost two-years after the United States Federal Trade Commission ("FTC") originally sued to block Otto Bock Healthcare's ("Otto Bock") acquisition of Freedom Innovations, the FTC unanimously voted on November 6, 2019, to uphold an FTC administrative law judge's decision that the transaction would, and has, substantially lessened competition in the United States for prosthetic knees equipped with microprocessors. As a result, the FTC has ordered Otto Bock to divest the Freedom Innovation assets to an FTC-approved buyer. Otto Bock's acquisition of Freedom Innovations closed in September 2017 and was not reportable to the US antitrust authorities under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act").

On September 27, 2017, Otto Bock simultaneously signed and closed its acquisition of FIH Group Holdings, the owner of Freedom Innovations. The transaction did not trigger a pre-closing antitrust filing in the United States. Otto Bock thereafter began its integration efforts. However, on December 20, 2017, the FTC issued an administrative complaint arguing that the transaction would likely lead to a lessening of competition for microprocessor prosthetic knees. According to the complaint, Otto Bock was the dominant provider in the United States for microprocessor prosthetic knees, which doctors often prescribe to patients with above-knee amputations meeting certain physical attributes and levels of mobility. Freedom Innovations was Otto Bock's "most significant and disruptive competitor," per the complaint. Based on the FTC and Department of Justice's ("DOJ") joint Horizontal Merger Guidelines, and relying on calculated concentration levels in the relevant market pursuant to the Herfindahl-Hirschman Index, the FTC argued that the transaction was presumptively anticompetitive.

The FTC challenged Otto Bock's acquisition before an FTC administrative law judge. Had the DOJ challenged the transaction, a judge in federal court would have heard the matter. This highlights an important distinction between the FTC and DOJ procedures. The FTC, using their discretion, can choose an administrative or federal judge to review its competition challenges.

In April 2019, the FTC administrative law judge issued his initial decision. The administrative law judge found sufficient evidence that the transaction would "significantly increase concentration" in the market for microprocessor prosthetic knees in the United States, leading to a presumption that the deal may substantially lessen competition. Pursuant to an order included with the initial finding, Otto Bock was required to divest the Freedom Innovation assets within 90-days after the order became final.

On November 6, 2019, the FTC's five Commissioners voted unanimously to uphold the administrative law judge's decision, leading to the FTC issuing an opinion and final order. This matter marks the first time this group of FTC Commissioners have ordered the unwinding of a consummated transaction.

The FTC's suit and decision are a reminder that the United States has the HSR Act, which governs when and how parties must make pre-closing notifications. And, separately, the United States has the Clayton Act, which is the substantive antitrust law under which transactions are adjudged. Unlike in many other jurisdictions around the world, the result is that transactions not requiring antitrust filings under the HSR Act may still be challenged by either the FTC or DOJ. Although rare, it should also be noted that the bifurcation of the United States' antitrust laws also means that even if parties make the necessary pre-closing filings and the mandatory waiting period expires or is terminated by the US antitrust authorities, the FTC and DOJ still have the authority to, at some later time, investigate and challenge the transaction if it raises substantive antitrust concerns.

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