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Litigators of the Week: Cravath and Cooley Clear a Path for Amgen's $27.8B Acquisition of Horizon Therapeutics

By Ross Todd
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Prior to the U.S. Federal Trade Commission's challenge to Amgen's $27.8 billion attempt to acquire Horizon Therapeutics, it had been more than a decade since the agency had challenged a merger in the pharmaceutical industry.

Perhaps the FTC should wait even longer next time?

Last week, in what The Wall Street Journal called "a rare instance of the FTC under Chair Lina Khan throwing in the towel on litigation," the agency and six state attorneys general dropped their bid for an injunction blocking the deal. The move came just 10 days after our Litigators of the Week—Amgen's lawyers at **Cravath, Swaine & Moore** and Horizon's at **Cooley**—filed their opposition briefs. **David Marriott** of Cravath and **Jacqueline Grise** of Cooley responded to the Litigation Daily's questions about the matter.

Lit Daily: How did this matter come to you and your firms?

David Marriott: Amgen has been an important and highly valued client of Cravath's for some time. Our partners **Keith Hummel** and **Sharonmoyee Goswami** have handled a number of important IP matters for Amgen over the years. My colleague, **Dan Zach**, was previously the head of the division at the FTC that reviews pharmaceutical mergers and he has given a lot of thought to potential theories that might apply to pharmaceutical merger challenges. In past discussions with Amgen, Dan flagged that this FTC would, at some point, likely challenge a pharma merger based on a bundling theory. When it became clear that was what the FTC was likely to do in this matter, Amgen reached out to Cravath to work with them and with

Courtesy photos

(L-R)David R. Marriott and Daniel K. Zach of Cravath and Jacqueline Grise and David Burns of Cooley.

the team at **Sullivan & Cromwell**, who had handled all of the Second Request work for the merger, to beat this merger challenge in court.

Jacqueline Grise: Cooley has been honored to serve as Horizon's trusted legal partner for over a decade, taking the company public in 2011, and representing the company in multiple acquisitions that built its portfolio, including its 2021 acquisition of Viela Bio for $3 billion. Over the past 10+ years, Cooley has worked with Horizon on all aspects of its business, from corporate matters, securities transactions, debt transactions and business development transactions, to antitrust and regulatory counseling, compensation and benefits, employment, patent, tax, securities litigation, commercial and IP matters.

What were the challenges you faced in handling this matter on such an expedited basis?

Marriott: Like all antitrust merger cases, the schedule in this matter was extremely compressed. On top

of that, there was no precedent for the FTC's allegations. We could not look to past merger cases as a blueprint because this type of case had never been tried before. Fortunately, our team has a wealth of experience trying not only complex merger cases, but difficult cases of all kinds. In the short time we had, and working alongside the Sullivan & Cromwell team, we developed a clear and powerful story for why the FTC's case made no legal, economic, or practical sense. We hired talented experts who drafted outstanding reports rebutting the FTC's and its experts' claims. And we developed the facts we needed through discovery that put us in an excellent position to win in court. All of that took tremendous effort and teamwork, as it always does to build a strong defense in a merger litigation. But the long hours that everyone at Amgen, Horizon, Sullivan, Cooley, and Cravath put in paid off.

Grise: From the beginning of the FTC's investigation and throughout the litigation, while we disagreed with the FTC's theory as a matter of law, we also viewed it as critical to demonstrate that the theory as applied to facts at issue just did not make any sense. For example, we spent a lot of time and effort marshaling the facts to demonstrate the implausibility of potential future competitors to Horizon's rare diseases medicines being foreclosed by a bundling strategy—a critical predicate to the FTC's theory.

Who was on your teams and how did you divide that work?

Marriott: This was a true team effort, led by **Tim Cameron**, Dan Zach, **Jesse Weiss** and myself. Tim took the lead on a number of critical expert reports and witnesses, while Jesse took the lead on several third party depositions and on drafting our preliminary injunction opposition brief, portions of which were read on the air during the CNBC program Squawk on the Street, where the brief was described as "chock-full of really good quotes" and "a very strong defense here made by Amgen." The four of us worked in tandem to develop and execute on our litigation strategy, coordinate with our expert teams, and develop a really favorable discovery record in the weeks before trial. We also worked side-by-side with the talented team at Sullivan, led by partners **Renata Hesse** and **Samantha Hynes**, and their lead associates **Daniel Richardson** and **Karl Bock**. The Sullivan team handled the consent discussions with the FTC, and made key contributions to the expert work, our court submissions and our overall development of a winning litigation strategy. And we could not have achieved all that we did without the outstanding in-house counsel team at Amgen, in particular **Jon Graham**, **Kim Dunne** and **Will Diaz**. It was true teamwork. Given the importance, complexity and speed of the case, a number of other members of the Cravath team also were involved and made important contributions to the case, including our partners **Rachel Skaistis**, **Noah Phillips** and **Maggie Segall**, and our talented team of practice area attorneys and associates, who worked tirelessly and effectively to make our case as strong as possible. This team included **Benjamin Bauer**, **Omar Debs**, **Hussein Elbakri**, **Catherine Sheets**, **Megan Vincent**, **Frances McDonald**, **Kelsey Miller**, **Chizoba Ukairo**, **Kendra Kumor** and **Kristina Stankovic-Kania**. Also part of the team were our Chicago counsel **James Figliulo** and **Dylan Smith** of **Smith, Gambrell & Russell**.

Grise: We leveraged a cross-specialty team of antitrust experts and civil litigators, including my partners **Ethan Glass** and **Matthew Kutcher**, special counsel **David Burns** and **Michael Berkovits**, associates **Amanda Griggs** and **Richard Lee**, and many others. Throughout the litigation, our team worked very closely and collaboratively with the fantastic lawyers and Cravath and Sullivan & Cromwell representing Amgen, as well as with in-house counsel at Horizon, **Sean Clayton** and **Nelson Alexander**.

Explain to me what was novel about the FTC's approach to this deal.

Marriott: Just about everything. The FTC's case was based on a non-horizontal, non-vertical, "future bundling" theory that had never been litigated in any court. There was no playbook for defending against such allegations. The FTC submitted expert reports raising theories that had never been raised in court before. We had to explain to a court not only why this case was not properly grounded in the law, but also why it made no economic sense and why, as a practical matter, Amgen could not—and would not—engage in the behavior the FTC alleged would occur after the merger. That involved researching decades-old case law, developing counterarguments to new economic theories, as well as old fashioned fact gathering to show why the FTC's case did not hold water. And ultimately we had to pull all of that together and tell a clear and persuasive story about why we should win, which we did in our brief just prior to the FTC deciding to settle the case.

Grise: Over the past several decades, FTC challenges to pharmaceutical transactions have been

based on "horizontal" competition concerns, i.e., that the merging parties are actual or potential competitors in one or more products or pipeline candidates. The FTC's challenge here harkens back to a period of antitrust enforcement dating to the 1960s, that elevated concerns about harm to competitors over harm to competition. As reflected in its recent draft merger guidelines, the FTC very much wants to reinvigorate these principles, but advancing this agenda will require prevailing in federal court and it remains to be seen whether that will obtain any traction.

How did you convince the FTC that a behavioral remedy—vowing not to bundle the Horizon drugs with other Amgen products—was viable given how outspoken the antitrust leadership at DOJ and the FTC have been about such remedies being ineffective?

Marriott: As mentioned, the Sullivan team, in conjunction principally with **Will Diaz** of Amgen, handled the discussions with the FTC on the consent agreement. Backing them up was a record and litigation strategy that we were confident would lead to victory in court. Amgen was clear both publicly and to the FTC that it would not engage in the conduct the agency had expressed concern about. And Amgen made clear from the outset that it would agree to a consent order to that effect. But the FTC sued to block the transaction anyway. It was only after the conclusion of fact discovery and the exchange of expert reports and briefs that the FTC staff and commissioners accepted Amgen's commitment in the form of a consent order and dropped the litigation. This was an excellent outcome for Amgen, which explained again after agreeing to the consent order that doing so will have no impact whatsoever on its business. Sometimes the best negotiating tool is building a strong case that you can win in court.

Grise: Not all behavioral remedies are created equally. In this case the FTC's articulated competitive concern was both very narrow, and involved potential future conduct that would be easy to monitor and detect, which makes for a straightforward and manageable behavioral remedy. More broadly, while we of course don't know what ultimately convinced the FTC, from our perspective the terms of the settlement reflect the strength of the case.

What can other pharmaceutical companies take from the outcome you for your client obtained here?

Marriott: Other pharmaceutical companies can take from this case that if they are prepared to litigate against a novel theory alleged by this FTC, they can still get their deals through. While I expect the FTC will continue to pursue novel theories in future matters, I believe companies that have the facts and law on their side, as Amgen did here, will be able to close their deals as long as they are committed to going the distance against the agency.

Grise: This case drew a lot of attention because a ruling in favor of the FTC could have had dire implications for future pharmaceutical M&A. While the outcome is certainly a positive signal, Chair Khan's statement—joined by Commissioners Slaughter and Bedoya, i.e., all three sitting Commissioners—makes clear that current FTC leadership views product bundling as a viable basis for challenging pharmaceutical transactions. The circumstances under which the FTC is likely to bring a similar case in the future, and its willingness to enter a settlement to resolve these types of concerns, will be core considerations pharmaceutical (and other) companies considering M&A will need to think hard about early on and throughout the process.

What will you remember most about this matter?

Marriott: Working with an incredible client to get a deal that will create enormous benefits for patients done. And working with people who are not only great at what they do, but who also care about the important mission of their company, including Jon, Kim, and Will. I will also remember how rewarding and, at times, fun it was to work on such an incredible team. This includes not only my outstanding colleagues at Cravath, but also the great collaboration we had with the teams at Sullivan and Cooley. I always say litigation is as close as you can come in this profession to participating in a team sport, something I loved to do when I was younger, and that held true in this matter.

Grise: It was an exceptional privilege to be able to contribute to this precedent-setting litigation that is at the forefront of the FTC's efforts to revamp its approach to assessing pharmaceutical M&A. The legal issues at the heart of this matter will undoubtedly arise again in future pharmaceutical transactions. More personally, the good humor, enthusiasm, and acumen exhibited by our friends at Horizon over the course of this lengthy process was inspiring to behold and we are grateful for this capstone to our 10-plus year journey together.

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