

# Portrait Of A Merger: Pfizer/Pharmacia Presents Unique Antitrust Aspects In Pharmaceutical Mergers

## Morgan Lewis

C O U N S E L O R S   A T   L A W

*The Editor interviews Willard K. Tom and Scott A. Stempel, Partners in the Antitrust Practice of Morgan Lewis in Washington, DC, who served as special antitrust counsel for Pharmacia and worked closely with Pharmacia General Counsel and Senior Vice President, Richard Collier.*

**Editor: Tell us about your backgrounds?**

**Tom:** I've practiced antitrust law for almost 24 years. I joined Morgan Lewis in 2000 after serving as Deputy Director at the Federal Trade Commission. Previously I served at the other federal antitrust agency, the Department of Justice, and before that had been in private practice for 12 years.

**Stempel:** I have been at Morgan Lewis my entire career, over 20 years. My practice has been devoted primarily to antitrust and intellectual property. I have done a lot of work for pharmaceutical and medical device clients and have worked on and off with what ultimately became Pharmacia Corporation dating back to when it was the Upjohn Company.

**Editor: Were you engaged as primary antitrust counsel for Pharmacia?**

**Stempel:** Yes. We have handled a number of antitrust matters for Pharmacia over the years, including litigation, counseling on business practices, and looking at potential deals. I am still representing the company in multidistrict antitrust litigation that goes back 10 years and evaluated the feasibility of several potential deals over the years.

**Editor: Could you explain the procedures you followed in taking Pharmacia from the very beginning of the merger process to the final culmination of the merger?**

**Tom:** I would put these activities into three categories. One, we needed to learn everything we could about the products and markets that were going to be an issue. Two, we had to start establishing communication lines with the staff. And three, we needed right from the start to begin working on the endgame—which in pharmaceutical cases usually means what divestitures will fix whatever competitive overlaps you have.

**Stempel:** We first got involved shortly after the companies signed the merger agreement, which was in July of 2002. There were a few months of preparation before filing the Hart-Scott-Rodino form and a fair amount of dialogue with the Federal Trade Commission staff during this period. In a merger that is going to get a close look, you want to do that work before you file because the agency only has 30 days from filing in which to decide whether to issue a "second request," which is typically a far reaching information request that signals that the agency has commenced an intensive investigation. This preparation included primarily identifying and analyzing possible competitive overlaps. Because antitrust agency review of pharmaceutical industry mergers focuses quite a bit on what is in the research and development pipeline, we had access to senior people in the company, responsible



Willard K. Tom

for R&D, who walked through the various products in development and then we compared notes with the Pfizer side.

**Tom:** Another early step is to make sure that the companies know what they need to do to make the process work smoothly. One of the worst things the parties can do is what antitrust lawyers call "gun-jumping," which is when the parties stop behaving like competitors before a merger is actually screened and approved. Early on we established ground rules about what the employees of the company were and were not allowed to do. Similarly, we made sure the documents would be preserved and that they would be ready when the staff needed them.

**Stempel:** Knowing that in a deal this size there would be some overlaps for which we would be getting a second request, we communicated with the staff to help them focus the investigation. After we received the second request, we began a process of responding to the priorities identified by the staff with respect to information. We produced a significant number of documents, offered people up for interviews on a voluntary basis, and the process continued through reaching some tentative agreements on areas where we would offer up solutions to what the staff perceived as competitive problems. There were a few areas where the staff initially wanted to go further and we persuaded them that they did not need to.

**Editor: Did you find that there were any products of significance that had to be divested?**

**Tom:** In all, there were nine separate products for which remedies had to be found. If you took all of those markets together, they accounted for about one percent or less of the combined companies' revenues.

**Editor: What kind of time period was allowed for divestiture?**

**Stempel:** The FTC, particularly in pharmaceutical mergers, typically requires a buyer up front, which means that we had to have the buyer identified and the FTC had to do its own due diligence on the buyer before it would approve the merger.

**Editor: Getting FTC approval of the buyer would seem to add some complexity to the process.**

**Stempel:** It adds both complexity and time.



Scott A. Stempel

Indeed, the FTC investigation of the last major pharmaceutical merger to be approved before this one, that of Glaxo and SmithKline, took much more time. There are three reasons why these mergers take time. One, there are a lot of markets at issue—in the pharmaceutical area every different therapeutic area is a different market so diversified pharmaceutical companies that sell hundreds of drugs operate in many different markets. Second, the FTC looks at all market overlaps very carefully, no matter how small, so that in the context of the merger of these two companies with combined revenues of \$48 billion today, there was a remedy requiring the divestiture of products with \$5-10 million of annual sales. Third, the remedies themselves can be very complicated—as I mentioned, you need a buyer up front, and in the pharmaceutical industry there are many strategic alliances, co-promotion agreements or joint development agreements with third parties. Those entanglements may have to be worked through not only with the seller and buyer but also with a third party licensor, for example.

**Editor: Does the FTC require a letter of intent plus a statement of financial well being for the potential purchaser of the divested product or do you have to be well into the purchase process?**

**Tom:** The FTC is far more thorough than simply accepting representations of financial strength. They will look very closely at business plans, manufacturing capabilities, whether the party can get the raw materials, ability to market the product, etc. They will undertake a full-scale investigation to ensure that the buyer of the divested product is going to be as strong a competitor as the merging parties would have been.

**Editor: How long was the period from the signing of the merger agreement in July 2002 to the FTC's final clearance of the acquisition?**

**Stempel:** A period of approximately nine months. Shareholders of both companies had approved the merger toward the end of 2002 and the transaction actually closed around April 15.

**Editor: What kind of technology did you use to assist you?**

**Tom:** In addition to e-mail we hosted an e-Room, which allowed all members of the

team including the in-house lawyers, to access a secure server hosting the documents through the Internet. For the document review, we had a large proportion of the documents sent by the client electronically and reviewed them online. We took advantage of key-word searching where possible to get the documents reviewed to a manageable scale and for a period we had additional staffing from a firm called Lexolution that gave us people working 2 shifts around the clock.

**Editor: Did you call in experts either to develop documents or testify?**

**Stempel:** Pfizer had retained an economic consulting firm called Lexecon, which helped in connection with a couple of markets. On a few occasions where the issue was whether two products in development would compete in the market, we called upon "key opinion leaders," physicians usually associated with large teaching hospitals who write and speak frequently about a particular therapeutic area, usually head up cutting edge clinical trials, and are recognized leaders in their fields. We engaged some of these leaders to opine that the way a particular condition is treated would not call on a physician to consider two drugs as competitive alternatives.

**Editor: Do you feel that you have gained expertise in taking mergers such as this through the FTC in the sense that you know the personnel and their predilections?**

**Tom:** There is no doubt that there is a specialized lore that develops from having experience with the people, the agency, the methods and with the kinds of concerns that they worry about. Having the time inside the agency, as I have had, gives one perspective. Going through deals from the outside gives a different perspective. As a result, it becomes easier to manage the process, to get it done quickly and efficiently and to be on the same page as the lawyers at the agency.

**Stempel:** The pharmaceutical industry is different from most. Here you need to have an appreciation and understanding of IP issues, an appreciation and understanding of FDA regulation, and an appreciation and understanding of how these companies do business. For instance, the ways in which prescription drugs reach the market and are paid for is unique. You may take a drug, but you are not the consumer in the same sense as buying a car, for example, because you are not paying for the full cost of a prescription drug if you are covered by a health plan. You have payment by insurers, decision-making by physicians and actual use by consumers broken down into three parts and that adds a layer of complexity in understanding how these markets work and how competition works. In addition, the product pipeline is much more significant in this industry. You have to understand this as well as how clinical trials work and the significance of a product in the context of its life cycle. Having experience in life sciences and the pharmaceutical industry is a big plus.

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