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Court Declines to Dismiss Antitrust Claim Alleging Private Equity Firms Allocated Market for Leveraged Buyouts

In a significant decision for private equity firms, hedge funds, and other participants in corporate acquisitions, a U.S. District Court on December 15 denied a motion to dismiss a class action complaint alleging a conspiracy among certain private equity firms to allocate the LBO market on a wide scale.[1] The case is *Dahl v. Bain Capital Partners, LLC, et al*., pending in the District of Massachusetts.

The complaint in the case, which is one of several cases filed after the U.S. Department of Justice began an inquiry involving certain private equity firms in 2006, alleges that 17 private equity firms violated the antitrust laws by conspiring to pay less than fair value for target companies in a series of LBOs between 2003 and 2008. Although the transactions at issue were so-called "club deals," the plaintiffs do not challenge the legality of club deals themselves. Instead, plaintiffs allege an "overarching conspiracy" whereby the defendants purportedly allocated the market for LBOs by, among other things, submitting sham bids, agreeing not to bid, and including "losing" bidders in the transactions.

The court denied the defendants' motion to dismiss the complaint, concluding (i) that the application of the antitrust laws was not preempted by the securities laws, and (ii) that the plaintiffs had adequately alleged a conspiracy under the Sherman Act.

As to preemption, the court rejected the defendants' argument that the challenged conduct was immune from antitrust scrutiny under the Supreme Court's 2007 decision in *Credit Suisse Securities (USA) LLC v. Billing*. In that decision, the Supreme Court held that the antitrust laws were impliedly repealed by the securities laws in connection with the allocation of shares in initial public offerings because of the Securities Exchange Commission's extensive regulation of that process. Here, the district court found that there was no implicit repeal because private equity LBOs "do not lie within an area of the financial market that the

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[1] Earlier this year, another district court reached a different result in a similar case alleging collusion among private equity firms. See our February 26, 2008 article titled "District Court Dismisses Antitrust Class Action Complaint Against Private Equity Firms," available by clicking here.

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securities laws seek to regulate, as their *private*, as opposed to public, nature leaves them untouched by the securities laws." The court further concluded that the lack of substantive regulation of private equity firms by the Securities Exchange Commission, and the absence of any conflict between the securities laws and the antitrust laws in this area, weighed against any finding of preemption.

In concluding that the complaint adequately alleged a conspiracy, the court relied heavily on allegations about "the presence of the same [private equity] firms in multiple transactions," and cited several examples. According to the court, this "overlap in firms," coupled with allegations that the defendants "conspired to prevent open, competitive bidding" for the target companies, "plausibly suggests an illegal agreement."

This is a significant decision for private equity firms, hedge funds, and other participants in corporate acquisitions for a number of reasons. While the decision does not directly implicate individual "club deals," it does suggest that coordinated bidding practices may support an antitrust claim, especially when they occur across a series of transactions involving a number of the same firms. In light of this decision, firms should think carefully about joint bidding practices and the identity of participants in prior transactions when considering future transactions.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum may be addressed to any of the following:

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