Paul|Weiss

February 26, 2008

District Court Dismisses Antitrust Class Action Complaint Against Private Equity Firms

In the wake of the Department of Justice's inquiry into alleged anticompetitive behavior among certain private equity firms, a handful of class actions have been filed alleging collusion among private equity firms.[1] These complaints generally allege a conspiracy among private equity firms to rig bids or otherwise collude to suppress the prices paid in going-private transactions. On February 21, 2008, in what appears to be the first decision to address these issues, a district court dismissed an action against two private equity firms that had joined forces in a bidding contest, concluding that the facts alleged did not establish a violation of the Sherman Act.

The putative class action, *Pennsylvania Avenue Funds v. Edward Borey, et al.*, was filed in the United States District Court for the Western District of Washington on December 5, 2006. The complaint alleged that two groups of private equity firms, which had originally competed for the acquisition of the target company (an Internet security company), joined forces and entered into an agreement to fix the acquisition price of the target company. Plaintiffs alleged that this agreement violated Section 1 of the Sherman Act's prohibition on agreements in restraint of trade. In a two-part analysis, the court dismissed plaintiffs' claim.

First, the court determined that joint bids by private equity firms are not *per se* illegal under the Sherman Act. Finding no prior precedent for its analysis, the court assessed "in the first instance, the economic effects" of price fixing among rivals for control of a target company. The court recognized that private equity firms that join forces can promote rather than suppress competition. "By joining forces, and thus combining resources, poorer contestants can gain access to the contest, thus increasing competition." Because the practice of joint bidding was not invariably anticompetitive, the court held that it should analyze the challenged conduct under the rule of reason instead of applying the *per se* rule.

Second, the court concluded that plaintiffs had not adequately alleged that the defendants possessed market power in a relevant market sufficient to support a claim under the rule of reason. As the court explained, the allegations did not establish that the defendants had market power in the market for corporate control of technology companies because there was no allegation that the

---

[1] This article follows up on our earlier article on these issues from November 21, 2006 titled "Class Action Filed Alleging Bid Rigging in Private Equity Transactions," available by clicking here.

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

1615 L Street, NW
Washington, DC 20036-5694
(202) 223-7300

Alder Castle, 10 Noble Street
London EC2V 7JU England
(44-20) 7367 1600

Fukoku Seimei Building 2nd Floor
2-2, Uchisawaicho 2-chome
Chiyoda-ku, Tokyo 100-001, Japan
(81-3) 3597-8101

Unit 3601, Fortune Plaza Office Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
(86-10) 5828-6300

12th Fl., Hong Kong Club Building
3A Chater Road, Central
Hong Kong
(852) 2536-9933

combined resources of the defendants constituted anything "more than a miniscule fraction" of the resources available in this market. The court also rejected the allegation that defendants had market power in the market for the target alone. The court refused to infer that defendants had market power to block other suitors from bidding on the target; instead, the court reasoned that other suitors had refused to bid for the target because they did not consider it to be an attractive asset.

While this result is promising for private equity firms, it is uncertain whether other courts will uphold this decision or apply the same reasoning as the district court did in this case. There is, however, little doubt that these issues will be revisited in other antitrust class actions against private equity firms.

* * * *

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:

Daniel J. Leffell	(212) 373-3218	Joseph J. Simons	(202) 223-7370
Moses Silverman	(212) 373-3355	Aidan Synnott	(212) 373-3213
		Andrew Finch	(212) 373-3460