Paul|Weiss

October 11, 2006

Antitrust Issues in Bidding for Corporate Control

As has been widely reported this week, the United States Department of Justice has begun an inquiry into allegedly anticompetitive behavior among certain private-equity funds. It is not clear how widespread the investigation will be, and it may well be limited to a few transactions. Nevertheless, this investigation sounds an important alarm about the risks that can arise under federal and state antitrust laws from coordination between competing bidders — or potentially competing bidders — for a target company. Antitrust issues could arise from a wide array of conduct by private equity firms, ranging from communications with competing bidders about pricing, to joint bids (either initially or by previously competing bidders), to agreements by a bidder to withdraw from an auction as part of a formal or informal deal with a competing bidder.

The federal antitrust laws (and the law of most states) generally prohibit bid-rigging, an agreement between competitors to submit or not to submit a bid to a third party. Violations can result in civil liability for treble damages, as well as criminal penalties. During the takeover waves of the 1970's and 80's, however, courts tended to reject federal antitrust challenges to alleged anti-competitive practices in connection with auctions for a public company, in some cases on the ground that the sale of stock of a single company in the context of a takeover battle simply does not fall within the coverage of the Sherman Antitrust Act.

This situation changed — at least theoretically — in 1990. In that year, the United States Court of Appeals for the Second Circuit (whose precedents are binding on federal courts in New York, among other states) rejected this reasoning, strongly suggesting that the Sherman Act may well apply to some cases involving the sale of stock of an individual company. Nevertheless, the Second Circuit upheld the lower court's dismissal of an antitrust claim based on joint action between two competing bidders on the ground that the Williams Act, which governs tender offers (but not public company acquisitions outside the tender offer context) and allows competing bidders to make a joint bid, implicitly revokes the Sherman Act to that extent. Since 1990, there have been few if any successful antitrust claims based on conduct of competing bidders in an auction for a public company, leading to a widely held perception that collusive practices in the market for corporate control are effectively immune from antitrust scrutiny.

Against this background, the recently reported investigation by the Justice Department is an important reminder that the market for corporate control is not immune from the antitrust laws, and competing (or potentially competing) bidders for a corporate target should not engage in any cooperation or coordination without a clear understanding of the potential antitrust issues

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

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

involved.[1] While every transaction and every case is different, it is useful to bear in mind a few general guidelines:

- Transactions involving the purchase and sale of *assets*, or securities that are *not publicly traded*, are clearly *not* insulated from antitrust coverage by the federal securities laws.

- *Joint bidding* for a target company in the context of a tender offer is likely beyond the reach of the federal antitrust laws, which the Second Circuit has held to be pre-empted by the Williams Act to that extent. (Such preemption would probably also neutralize state antitrust laws in such cases.) This preemption may provide little comfort to bidders in real-world situations, as they often cannot know, at the time they agree to submit a joint bid, whether a proposed transaction will ultimately take the form of a tender offer. Nevertheless, while we are aware of no case addressing joint bidding for a public company outside the tender offer context, we believe that such joint bids are likely beyond the reach of antitrust laws, as well.

- Regardless of pre-emption by securities laws, *joint bidding* by two parties will not necessarily violate the antitrust laws — particularly if neither could bid alone (because, for example, neither has the financial resources to meet the clearing price) — just as competitors are in many cases permitted to form a joint venture to bid on a particular contract.

- The touchstone for antitrust risks governing most joint bidding scenarios is whether the seller would be harmed by the joint bid as opposed to independent bids, and the seller's perception in this regard could carry significant weight.

- So-called "naked" agreements between actual bidders that eliminate competition between them — such as a payment by one bidder to another to drop out of the bidding — are to be avoided, as such agreements ordinarily constitute *per se* violations of the Sherman Act.

In the real world, there is of course a vast array of possible cooperative arrangements that do not fall under any of these guidelines, and even where these guidelines apply, they may be subject to exceptions in particular cases. In addition, there is very little recent case law or guidance in this area, and what is considered permissible may evolve as a result of future private lawsuits or government enforcement actions. Bidders who are in doubt about whether a proposed agreement or course of action may violate antitrust laws would do well to seek legal advice. The consequences of failing to do so could be quite severe.

* * * *

---

[1] Antitrust issues are not the only legal issues arising from coordination among bidders for a corporation. Such activities often raise other issues as well, such as under a nondisclosure agreement between a bidder and a target, which may prohibit or restrict the sharing of confidential information, or even joint bidding.

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

Paul D. Ginsberg	(212) 373-3131	Daniel J. Leffell	(212) 373-3218
Toby S. Myerson	(212) 373-3033	Joseph J. Simons	(212) 373-7370
Robert B. Schumer	(212) 373-3097	Aidan Synnott	(212) 373-3213
Moses Silverman	(212) 373-3355		

© 2006 Paul, Weiss, Rifkind, Wharton & Garrison LLP