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Seventh Circuit Dismisses Clayton Act Section 8 Derivative Case

In a recent decision, the Seventh Circuit sharply limited the ability of shareholders to bring derivative suits for possible violations of section 8 of the Clayton Act, 15 U.S.C. § 19 (2006), which prohibits interlocking directors and officers between competitors.

The court, in *Robert F. Booth Trust v. Crowley*, No. 10-3285 (7th Cir. June 13, 2012), reversed an order of the district court denying a motion to intervene by another stockholder of Sears, Roebuck & Co. ("Sears"), the corporation at issue, who sought to oppose a settlement related to the section 8 suit. The court then went further, ordering the district court to enter judgment in favor of the defendants, finding "this litigation is so feeble that it is best to end it immediately."[1] Plaintiffs had not suffered a cognizable antitrust injury and were abusing the legal system by using this antitrust suit solely for the purpose of extracting attorneys' fees from Sears.

This decision demonstrates why courts are unlikely to entertain derivative suits for section 8 violations, and will rely instead on actions by government agencies to enforce it. The Seventh Circuit panel that heard this case included Chief Judge Frank Easterbrook, the author of the opinion, and Judge Richard Posner, both highly influential antitrust jurists who expressed a healthy skepticism of the value of section 8 in this opinion. Although there has been some interest from class action lawyers in pursuing these types of claims in recent years,[2] this decision is likely to chill similar suits in the future.

We stress that this decision does not mean corporations should ignore section 8 issues. The government still investigates overlaps and a number of corporations have endured painful such investigations and, in some instances, have been required to enter into consent decrees to resolve them. Further, corporations with section 8 issues can find themselves with Sherman Act issues as well where the overlapping officers or directors share competitively sensitive information with their other corporation.

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In 2005, Sears merged with Kmart Corp., inheriting directors from the boards of both companies. One director also served on the boards of AutoNation, Inc., and AutoZone, Inc. Another director also served on the board of Jones Apparel Group, Inc. Section 8 of the Clayton Act prohibits a director or officer of one corporation from also serving as a director or officer of a competitor. Sears is a major seller of both automotive parts and clothing. So it is easy to see why having these directors on the board could create a section 8 problem.

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[1] *Robert F. Booth Trust v. Crowley*, No. 10-3285, slip op. at 7 (7th Cir. June 13, 2012).

[2] *See, e.g.*, *In re eBay, Inc., Derivative Litig.*, 2011 U.S. Dist. LEXIS 99245 (D. Del. Sept. 2, 2011).

Plaintiffs Robert F. Booth Trust and Ronald Gross were shareholders of Sears. In 2010 they filed a shareholders' derivative action, alleging violations of section 8. Sears reached a proposed settlement with the plaintiffs that would have paid their counsel $925,000 in legal fees and required one of the contested directors to step down. In response, Theodore H. Frank, another shareholder of Sears, moved to intervene in the case to oppose the settlement. Frank believed that the settlement would deprive Sears of cash and competent directors. The district court denied the motion to intervene and Frank immediately appealed to the Seventh Circuit.

After it decided that Frank should have been allowed to intervene, the Seventh Circuit ordered the district court to end this "feeble" case and enter judgment for the defendants rather than "leave the parties to slug it out."[3] Private antitrust litigation is supposed to be available "to suits by those persons for whose benefit the laws were enacted."[4] Section 8 was primarily meant to protect consumers, not shareholders, from the risk that "producers will cooperate and raise prices to the detriment of consumers."[5] The court concluded neither the corporation nor the plaintiff shareholders has suffered a cognizable antitrust injury.

Judge Easterbrook even went so far as to suggest that shareholders might benefit from interlocking directorates. At the very least, having directors with experience in these industries "promotes competent and profitable management."[6] Before shareholders can bring derivative claims, they must make a demand to the board to fix the problem, or show why making such a demand would be futile. But plaintiffs here skipped this step, probably because "if they had made a demand, conscientious directors acting in investors' interests *would* have nixed this suit," concluding that having these directors was in the company's best interest.[7] This suggestion that knowingly perpetuating a statutory violation might be an appropriate exercise of fiduciary duties appears somewhat questionable.

Plaintiffs argued that "investors still can gain from this suit, because removing interlocking directors from the board will eliminate any chance that the United States will file a section 8 suit."[8] But the court noted litigation by the government for a potential section 8 violation is exceedingly rare—the last such case began in 1978. Instead. when the government identifies an interlocking directorate issue, it usually just notifies the corporation and allows it to fix the problem. Replacing the miniscule threat of a government suit with the certainty of the exact same action filed by shareholders could not improve the position of investors. As the court put it, "[h]ow can replacing a 1% or even a 20% chance of a bad thing with a 100% chance of the same bad thing make investors better off?"[9]

The court concluded that there could be no point to this suit except "cram[ming] unnecessary litigation down the throat of firms whose directors serve on multiple boards, and then us[ing]

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[3] *Robert F. Booth Trust v. Crowley*, No. 10-3285, slip op. at 7 (7th Cir. June 13, 2012).

[4] *Id.* at 3.

[5] *Id.*

[6] *Id.* at 9.

[7] *See id.*

[8] *Id.* at 8.

[9] *Id.*

the high cost of antitrust suits to extort settlements (including undeserved attorneys' fees) from the targets."[10]

The court's decision seems primarily driven by disgust with strike suits rather than any suggestion that section 8 has outlived its usefulness. While it may give corporations some comfort that they should not fear strike suits on such issues, it should not be taken as license to violate the statute without fear of government enforcement or suits by plaintiffs with antitrust standing, such as customers.

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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 should be directed to:

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[10] *Id.*

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