Simpson Thacher

Memorandum

Antitrust Collusion & Sponsor Liability
Packaged Seafood Ruling Is Latest In Emerging Trend

September 18, 2023

A recent decision in *In re Packaged Seafood Products Antitrust Litigation* is forcing a private equity firm to stand trial on whether it participated in a portfolio company's conspiracy in violation of federal antitrust law.[1] The decision is the latest development suggesting that antitrust authorities and private plaintiffs continue to look for ways to hold sponsors, like private equity firms and other investors, liable for potential competition infringements by their portfolio companies.[2]

Packaged Seafood Background

The main players in the U.S. packaged seafood industry are Bumble Bee, Chicken of the Sea, and StarKist. In December 2010, the private equity firm Lion Capital LLP acquired Bumble Bee. In December 2014, Lion Capital LLP announced its intent to sell Bumble Bee to the parent company of Chicken of the Sea. But the sale fell through following the initiation of a Department of Justice ("DOJ") investigation into potential price fixing in the industry in violation of antitrust laws.[3]

The DOJ's investigation resulted in prosecutions of Bumble Bee, StarKist, and three of their executives, as well as the trial and conviction of Bumble Bee's former president and CEO, Christopher Lischewski. Private plaintiffs also filed dozens of class action complaints to recover treble damages, including against (i) Bumble Bee owners Lion Capital LLP and its subsidiary Lion Capital (Americas), Inc. (collectively, "Lion"); and (ii) Big Catch Cayman LP, a holding company of Bumble Bee shares. The court denied a motion for summary judgment as to Lion, but granted it as to Big Catch Cayman LP.

The Court's Decision

The court explained that Lion would be liable for Bumble Bee's antitrust conspiracy if it (i) independently participated by engaging in anticompetitive conduct in furtherance of the conspiracy; and (ii) acted either with the knowledge that the action would have unreasonable anticompetitive effects or with the purpose of producing

[1] *In re Packaged Seafood Prods. Antitrust Litig.*, 15-md-2670, 2023 U.S. Dist. LEXIS 148154 (S.D. Cal. Aug. 18, 2023).

[2] *See, e.g.*, *Goldman Sachs Grp., Inc. v. Eur. Comm'n* (Jan. 27, 2021), available here; *In re Liquid Aluminum Sulfate Antitrust Litig.*, 2:16-md-2687 (D. N.J.),.

[3] Section 1 of the Sherman Antitrust Act prohibits any agreement that unreasonably restrains trade between states or with other nations. 15 U.S.C. § 1. Individual states and foreign jurisdictions have similar laws against agreements in restraint of trade. Civil plaintiffs suing for Section 1 violations may recover treble damages arising from the conspiracy from any individual defendant, and so-called "hardcore" violations of Section 1, like price fixing, are felonies requiring fines or jail time.

those effects. After rejecting the argument that Lion had no financial interest in Bumble Bee, the court found sufficient evidence attributable to Lion to permit a jury to find both elements satisfied.

Knowledge—The court found that Lion had knowledge of the alleged conspiracy. Three evidentiary findings guided the court's conclusion. First, in early due diligence, the Lion deal team noticed analyses suggesting that Bumble Bee could be profitable despite declining demand because competitors were predictable and avoided what they perceived as one another's markets. Second, a whistleblower sent a letter to Lion claiming Bumble Bee was violating antitrust laws, which was consistent with other evidence available to Lion, such as suspicious comments from Bumble Bee's then-CEO and evidence that Bumble Bee was receiving internal competitor information. Finally, Lion personnel met with the owner of StarKist; the evidence indicated they may have discussed price; and, as further context for those meetings, the court noted that Bumble Bee's then-CEO recommended that Lion provide assurances to StarKist that Bumble Bee would act "rationally" in the market.

Participation—The court further found that Lion may have participated in the alleged conspiracy. In support of this conclusion, the court again focused on the Lion meetings with a competitor and the whistleblower letter. The court reasoned, "Discussing prices with a competitor in the context of this case is an act in furtherance of Bumble Bee's price-fixing conspiracy."[4] And with respect to the whistleblower letter, the court found that Lion did not do enough in response, let alone attempt to stop any anticompetitive conduct. The court reasoned that even if the handling of the whistleblower letter was not "direct action," it was knowing approval or ratification that amounted to participation.[5]

Key Takeaways

Packaged Seafood continues a growing trend of plaintiffs and regulators seeking to hold sponsors liable for alleged collusive conduct by their portfolio companies. For example, in *Goldman Sachs Group, Inc. v. European Commission*, Goldman Sachs was held liable by the European competition authority for the collusion of its subsidiaries in the sale of power cables due to its control of voting rights and overall influence over the subsidiaries.[6] Similarly, in *In re Liquid Aluminum Sulfate Antitrust Litigation*, American Securities LLC settled claims that it participated in a conspiracy to fix the price of liquid aluminum sulfate through, among other things, its involvement in a portfolio company's bidding processes.[7]

[4] *Packaged Seafood*, 2023 U.S. Dist. LEXIS 148154 at *70.

[5] *Id.* at *71 (quoting *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd.*, 467 F. Supp. 841, 852 (N.D. Cal. 1979)).

[6] *Goldman Sachs Grp., Inc. v. Eur. Comm'n* (Jan. 27, 2021), available here.

[7] *In re Liquid Aluminum Sulfate Antitrust Litig.*, 2:16-md-2687 (D. N.J. Apr. 18, 2019) (Doc. 1273-2) (American Securities LLC settlement agreement).

In light of this developing trend, sponsors should give careful consideration to:

- *Assessing the structure of a potential investment and the impact of that structure on the sponsor's exposure to liability for any potential competitive misdeeds of a portfolio company*. The more control a sponsor retains and hands-on it is in managing its investment in a portfolio company the greater the risk it has of being held jointly liable for any potential competitive misdeeds by that company.
- *Ensuring that competition issues receive appropriate consideration throughout the due diligence process leading up to any potential investment*. Due diligence, for example, should include an analysis of the target and its industry for past antitrust issues or vulnerabilities—*e.g.*, previous investigations, patterns of industry contact/collaboration (even if facially innocuous, such as swap agreements or trade groups), potentially incongruous plans for growth, or other industry features that may lend themselves to antitrust risks.
- *Insisting portfolio companies maintain robust antitrust compliance programs that conform to best practices*. Such programs should include up-to-date and comprehensive policies and procedures, employee training, and risk management and escalation processes. They should also include identified individuals and/or departments who are held accountable for implementing the program and instilling an overall culture of compliance at the company.

For further information on this development or any other antitrust issue, please contact those listed below or another member of Simpson Thacher & Bartlett's Antitrust and Trade Regulation Practice.

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