PE In The Crosshairs Of Public And Private Antitrust Enforcers

By **Denise Plunkett, Kail Jethmalani and Angela Farren** (May 8, 2024)

Denise Plunkett

Kail Jethmalani

Angela Farren

This article highlights the antitrust risks that private equity firms may encounter when their portfolio companies are accused of anti-competitive conduct.

A series of decisions by the U.S. District Court for the Southern District of California in the In re: Packaged Seafood Products Antitrust Litigation[1] — a case that settled in April — provide fresh insight into how plaintiffs may seek to impose such liability and how courts may analyze those efforts.

Background

Private equity firms are facing increased threats of liability for anti-competitive conduct of their portfolio companies. The antitrust agencies' heightened scrutiny of private equity companies — particularly with regard to acquisitions — is manifest in their recent speeches and policy statements.

Moving beyond mere pronouncements, the agencies have made good on their stated priorities in this area by bringing a number of antitrust enforcement actions against private equity firms.[2]

For example, in September 2023 the Federal Trade Commission asserted antitrust claims against both U.S. Anesthesia Partners Inc. and its private equity owner, Welsh Carson Anderson & Stowe, for allegedly rolling up and monopolizing the market for anesthesiology practices around Houston, Dallas and Austin, Texas.[3]

The plaintiffs bar has had its sights turned in this direction for some time.

In the Gibson v. Cendyn Group decision, for example, the plaintiffs alleged that the defendant hotel operators violated Section 1 of the Sherman Act by agreeing to use the same third-party revenue management software, thereby artificially inflating the price of hotel rooms on the Las Vegas Strip.[4]

In addition to suing the hotel operators, the plaintiffs asserted claims against private equity firm Blackstone based on its alleged ownership and operation of defendant The Cosmopolitan Hotel.[5]

In April, the U.S. District Court for the District of Nevada denied Blackstone's motion to dismiss on the basis that the plaintiffs had plausibly alleged Blackstone controlled the Cosmopolitan and its pricing at the time of the alleged conspiracy.[6]

In In re: RealPage Inc., Rental Software Antitrust Litigation — No. II — private plaintiffs asserted antitrust claims against RealPage, a property management software company, its private equity parent company, Thoma Bravo, and a group of large landlords alleging they

conspired to fix residential rental prices.[7]

The plaintiffs alleged that Thoma Bravo participated in the conspiracy through "its influence and control over RealPage's operations."[8] Thoma Bravo moved to dismiss on the basis that allegations of its ownership of RealPage were insufficient to show participation in the alleged conspiracy.[9]

In December 2023, the court denied the motion, finding the allegations of Thoma Bravo's control —"select[ing] the new CEO and COO" of RealPage, "infiltrat[ing] RealPage's corporate suite," and "putting itself in charge of the company's board"— sufficient to infer Thoma Bravo independently acted in furtherance of the conspiracy.[10]

In December 2020, in Jones v. Varsity Brands LLC in the U.S. District Court for the Western District of Tennessee, private plaintiffs asserted antitrust claims against Varsity Brands for allegedly monopolizing the market for competitive cheer and conspiring to raise prices in that market.[11]

Indirect purchaser plaintiffs added claims against private equity owners, Bain Capital and Charlesbank Capital Partners LLC, based on allegations that they had control of Varsity and took part in the claimed anti-competitive conduct.[12]

As another example from July 2017, in In re: Liquid Aluminum Sulfate Antitrust Litigation, the U.S. District Court for the District of New Jersey denied the motions to dismiss made by private equity company American Securities LLC and two of its individually named directors, holding that the plaintiffs had sufficiently alleged the company and its directors had direct involvement in the portfolio company's alleged conspiracy to fix the price of liquid aluminum sulfate.[13]

The court rejected the private equity defendants' argument that "their mere ownership of Defendant GenChem [was] insufficient to subject them to liability."[14] Rather, it found that the plaintiffs had plausibly alleged their direct involvement in the alleged conspiracy because they:

- Reviewed and authorized significant aluminum bids;
- Oversaw GenChem's announced intent to "'optimize' Alum prices within the market";
- Required that all bids by the portfolio company over a certain amount be approved by the private equity fund; and
- Requested monthly reports to monitor the conspiracy.[15]

In 2019, American Securities settled the antitrust claims against it and its directors for $13 million, and GenChem and other defendants settled for a total of $51 million.[16]

Courts have suggested that separate portfolio companies managed by a single private equity firm are capable of conspiring with each other in violation of Section 1 of the Sherman Act, notwithstanding the U.S. Supreme Court's seminal holding in Copperweld Corp. v. Independence Tube Corp. in 1984.

In that decision, the justices held that coordination between a parent corporation and its wholly owned subsidiary does not warrant Section 1 scrutiny because it "does not represent

a sudden joining of two independent sources of economic power."[17]

In September 2011, in In re: Platinum and Palladium Commodities Litigation, the U.S. District Court for the Southern District of New York held that a group of affiliated investment funds managed by a limited partnership may, in theory, be capable of conspiring with each other under Section 1.[18]

The court observed that the analysis "does not turn simply on whether the parties involved are legally distinct entities," but whether the entities are independent decision-makers.[19]

Although the court ultimately dismissed the claims on the grounds that the complaint failed to adequately allege the existence of an agreement among the funds, it certainly did not foreclose the plaintiffs' theory of liability.

The burgeoning focus on pursuing antitrust claims against private equity firms is likely to be bolstered by the Southern District of California's August 2023 decision in In re: Packaged Seafood Products Antitrust Litigation.[20]

The court denied two private equity firms' motions for summary judgment regarding their alleged participation in a global conspiracy to fix the price of canned tuna through their portfolio company, Bumble Bee Foods LLC.

As discussed below, this case provides an apt illustration of the liability theories and risk that private equity firms may encounter when a portfolio company is accused of anti-competitive conduct.

Packaged Seafood Products' Vicarious Liability Theories

Following Bumble Bee's May 2017 guilty plea in a federal price-fixing probe regarding canned tuna, multiple putative class and direct action plaintiffs sued Bumble Bee and other producers of packaged tuna, together with Bumble Bee's UK-based private equity owner, Lion Capital LLP; its American subsidiary, Lion Capital (Americas) Inc.; and holding company Big Catch Cayman LP.[21]

The plaintiffs alleged that the Lion Capital entities either directly participated in the price-fixing conspiracy or could be held vicariously liable for Bumble Bee's participation.

The Southern District of California twice granted Lion Capital's and Big Catch's motions to dismiss.[22] On the first round in 2018, it held that the plaintiffs had alleged a plausible antitrust claim only against Lion Capital's American subsidiary, which was alleged to have directly participated in the conspiracy.[23]

As to the other Lion Capital entities, the court held that the plaintiffs had failed to plead their direct involvement, and did "not advance any arguments why the actions of [dual officers of Lion Capital and Lion Capital's American subsidiary] who participated in the alleged price fixing should be imputed to Lion Capital."[24]

Similarly, the court rejected the plaintiffs' attempt to hold any of the Lion Capital entities vicariously liable for Bumble Bee executives' conduct, holding that there is "no alter ego liability between Bumble Bee and any Lion entity."[25]

In 2020, the court subsequently granted Lion Capital's and Big Catch's motions to dismiss the amended complaint,[26] relying on the Supreme Court's 1998 ruling in U.S. v.

Bestfoods.

The Southern District of California explained that in Bestfoods, the Supreme Court established that

> when alleging liability for a parent corporation based on the actions of an employee of both the subsidiary and the parent corporation, the party alleging liability must plead facts showing that the employee was acting within his or her capacity as an employee of the parent corporation and not the subsidiary.[27]

The Packaged Seafood Products court applied this reasoning to determine that although the amended complaint alleged anti-competitive acts undertaken by dual officers of both Lion Capital and its American subsidiary, the plaintiffs had failed to plead sufficient facts that those employees were acting on behalf of Lion Capital.[28]

The case was reassigned to a new judge in August 2021. The court thereafter granted the plaintiffs' motion for reconsideration of the summary judgment decision and vacated the dismissal of Lion Capital and Big Catch.[29]

In doing so, the court articulated three potential paths for a claim against the two entities:

- If Lion Capital learned of the alleged conspiracy during due diligence in its 2010 acquisition of Bumble Bee;
- If Eric Lindberg, a Lion Capital partner and director with the company's American subsidiary who oversaw Bumble Bee, acted on behalf of Lion Capital rather than its American subsidiary, such that Lion Capital "participated through Lindberg" in the conspiracy; and
- If Lion Capital and its American subsidiary "engaged in coordinated activity as a single enterprise."[30]

Packaged Seafood Products' Vicarious Liability Theories Largely Survive Summary Judgment

In March 2023, the Lion Capital entities moved for summary judgment, arguing that the record evidence did not yield any triable issue of material fact under any of the theories of vicarious liability articulated by the court in its reconsideration decision.[31]

The court denied the motion as to Lion Capital and its American subsidiary, but granted summary judgment for Big Catch on the basis that the plaintiffs did not proffer sufficient evidence to show that Lion Capital used Big Catch to violate the antitrust laws.[32]

The court highlighted two key issues in denying summary judgment to Lion Capital and its American subsidiary.

First, the court found that the plaintiffs' evidence tended to exclude the possibility that Lion Capital and/or its American subsidiary were not involved in the price-fixing conspiracy.[33] It found sufficient evidence to establish an economic motive — i.e., Bumble Bee's participation in the conspiracy helped increase Lion Capital's and its American subsidiary's profits and ultimate sale value.[34]

The court opined that a reasonable jury could find that Lion Capital and its American subsidiary had requisite knowledge of the conspiracy based on: (1) due diligence during the acquisition of Bumble Bee; (2) receipt of a whistleblower letter alleging Sherman Act violations; and (3) receipt of communications from Bumble Bee management sharing internal competitor information, including competitors' future price decisions.[35]

Finally, the court found that a reasonable jury could conclude that Lion Capital and its American subsidiary engaged in anti-competitive conduct in furtherance of the conspiracy based on evidence that Lindberg discussed pricing with a competitor and failed to investigate the allegations set forth in the whistleblower letter.[36]

The court also concluded that the plaintiffs raised a genuine dispute of material fact regarding Lion Capital's involvement in the conspiracy.[37] The court focused exclusively on Lindberg's conduct, determining that the plaintiffs proffered sufficient evidence to demonstrate that Lindberg acted as a Lion Capital partner when meeting with a competitor of Bumble Bee.

Additionally, the court noted that the "whistleblower letter was sent to Lindberg addressed at Lion Capital with a return address at Lion Capital."[38] Accordingly, the court found that the plaintiffs had rebutted the Bestfoods presumption that Lindberg had represented Lion Capital and its American subsidiary separately.[39]

Faced with trial, on April 5, Lion Capital and its American subsidiary (and Big Catch, which prevailed on summary judgment) settled with the commercial food preparer plaintiff class for $275,000, and with certain direct-action plaintiffs for an undisclosed sum. Claims against Lion Capital and its American subsidiary by other plaintiffs are pending.

PE Funds Must Stay Aware, and Ahead, of Liability Risks

The August 2023 summary judgment ruling in Packaged Seafood Products warns private equity companies that they could face significant litigation expense and potential liability for alleged anti-competitive conduct by their portfolio companies. These risks increase if they fail to respect corporate formalities, or are involved in, or have reason to be aware of, the alleged misconduct.

Although the Packaged Seafood Products decision is not the first to recognize the potential for such vicarious liability, it comes in the wake of the antitrust agencies' announced focus on private equity activity and may set the stage for a new wave of private litigation in this arena. It is therefore critical for private equity firms to invest in robust antitrust compliance and antitrust due diligence in order to identify and minimize such risk.

Denise Plunkett is a partner at Axinn Veltrop & Harkrider LLP and chairs the firm's litigation practice.

Kail Jethmalani is a partner at the firm.

Angela Farren is an associate at the firm.

Disclosure: Plunkett represented plaintiffs in In re: Liquid Aluminum Sulfate Antitrust Litigation.

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[1] No. 15-MD-2670, 2023 WL 5344133 (S.D. Cal. Aug. 18, 2023).

[2] See Decision and Order, JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, FTC Docket. No. C-4766 (June 13, 2022); United States v. Assa Abloy, 1: AB et al., No. 22-cv-02791 (D.D.C. filed Sept. 15, 2022); United States v. UnitedHealth Grp. Inc. et al., No. 22-cv-00481 (D.D.C. filed Feb. 24,2022).

[3] Complaint, FTC v. U.S. Anesthesia Partners, Inc. et al., No. 23-cv-356003560 (S.D. Tex. Sep. 21, 2023).), ECF No. 1. The court heard arguments on the motion to dismiss briefing on March 28, 2024. See Notice of Resetting as to Motions to Dismiss, ECF No. 128 FTC v. U.S. Anesthesia Partners, Inc. et al., No. 23-cv-03560 (S.D. Tex. Mar. 8, 2024).), ECF No. 128.

[4] Order, No. 23-cv-00140, at 1 (D. Nev. Apr. 24, 2024), ECF No. 182.

[5] Id. at 2.

[6] Id. at 3-5.

[7] In re RealPage, Inc., Rental Software Antitrust Litig. (No. II), No. 23-CV-00326, 2023 WL 9004808, at *2 (M.D. Tenn. Dec. 28, 2023).

[8] Id. at *5.

[9] Id. at *3.

[10] Id. at *5, 6.

[11] Complaint, Jones et al. v. Varsity Brands, LLC, No. 20-cv-02892 (W.D. Tenn. Dec. 2010, 2020).), ECF No. 1.

[12] Order Granting Mot. for Leave to Amend, Jones et al. v. Varsity Brands LLC, No. 20-cv-02892 (W.D. Tenn. Sep. 20, 2023), ECF No. 48 . On April 1, 2024, the court granted the parties' joint motion to hold deadlines in abeyance pending submission of their motion for preliminary approval of a settlement agreement. See Order Granting Joint Motion to Hold Deadlines in Abeyance, ECF No. 603 (W.D. Tenn. Apr. 1, 2024).), ECF No. 603 .

[13] In re Liquid Aluminum Sulfate Antitrust Litig., No. 16-md-2687, 2017 WL 3131977, at *4 (D.N.J. July 20, 2017). Denise Plunkett, co-author of this article, represented a number of plaintiffs in this action litigation.

[14] In re Liquid Aluminum Sulfate Antitrust Litig., No. 16-md-2687, 2018 WL 658691, at *4 (D.N.J. Feb. 1, 2018).

[15] Id. at *2.

[16] In re Liquid Aluminum Sulfate, Antitrust Litig., No. 16-md-2687 (D.N.J. Feb. 6January

14, 2019) (), ECF No. 1189-2) (GenChem Settlement Agreement); Id. (D.N.J. Apr. 18, 2019) (), ECF No. 1273-2) (American Securities LLC Settlement Agreement).

[17] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767–68, 770-71 (1984).

[18] In re Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 596 (S.D.N.Y. 2011).

[19] Id.

[20] In re Packaged Seafood Products Antitrust Litigation, No. 15-MD-2670, 2023 WL 5344133 (S.D. Cal. Aug. 18, 2023).

[21] Order Granting Mot. to Add the Lion Entities, Packaged Seafood Products, No. 15-md-02670, ECF No. 884 (S.D. Cal. Apr. 10, 2018)), ECF No. 884 [hereinafter "ECF No. 884"].

[22] Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss, Packaged Seafood Products, No. 15- md-02670, ECF No. 1358 (S.D. Cal. Sept. 5, 2018)), ECF No. 1358 ("ECF No. 1358"); Order Granting Defs.' Mot. to Dismiss, Packaged Seafood Products, No. 15-md-02670, ECF No. 2270 (S.D. Cal. Jan. 29, 2020)), ECF No. 2270 ("ECF No. 2270").

[23] ECF No. 1358, at 79-86.

[24] See ECF No. 1358, at 86. The court found that Big Catch was the alter ego of Lion Capital but dismissed claims based on plaintiffs' failure to sufficiently allege Lion Capital or Big Catch's participation in the conspiracy. Id. at 70.

[25] See id.

[26] See ECF No. 2270, at 18.

[27] See id. at 16 (citing U.S. v. Bestfoods, 524 U.S. 51, 69-70 (1998)).

[28] See id.

[29] Order Granting Pls.' Mot. for Reconsideration 18-20, Packaged Seafood Products, No. 15-md-02670, ECF No. 2781 (S.D. Cal. Mar. 21, 2022)), ECF No. 2781 ("ECF No. 2781"). Because the court previously found that Big Catch was Lion Capital's alter ego, it held that plaintiffs stated an antitrust claim against Big Catch on the alter ego theory. Id. at 20.

[30] Id.at 18-20.

[31] Mem. of Points and Authorities ISO Lion Companies' Mot. for S. J. 33-41, Packaged Seafood Products, No. 15-md-02670, ECF No. 3036 (S.D. Cal. Mar. 24, 2022)2023), ECF No. 3036 ("ECF No. 3036").

[32] Packaged Seafood Products, No. 15-md-2670, 2023 WL 5344133, at *20.

[33] Id. at *18.

[34] Id. at *16.

[35] Id. at *15-17.

[36] Packaged Seafood Products, No. 15-md-2670, 2023 WL 5344133 at *18.

[37] Id.

[38] Id.

[39] On January 23, 2024, the court confirmed a settlement between the Lion Entities and the Commercial Food Preparer Plaintiffs. Motions for preliminary approval of the settlement are due April 5, 2024. See Order Granting Joint Motion for 30-Day Extension of Time to File Preliminary Approval Settlement Motions, Packaged Seafood Products, No. 15-md-02670, (S.D. Cal. March 1, 2024), ECF No. 3148.