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Antitrust Without Effect: Some Recent Case Studies

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The United States antitrust laws generally are designed to curtail anticompetitive behavior that has or is expected to have a significant impact on competition. However, the antitrust laws also create a procedural framework for enforcing these rules. A few recent cases serve as a reminder that violations of those procedures themselves can result in substantial fines, irrespective of any actual or expected impact on competition.

The standard rubric for analyzing most antitrust cases is the so-called "Rule of Reason" analysis, which weighs the potential anticompetitive effects of an agreement against the pro-competitive benefits that it may bring. A similar analysis is applied to merger review, which assesses whether a proposed transaction would "substantially lessen competition," and to adjudication of monopolization claims, which assesses whether the conduct alleged will "exclude competition" in some relevant market. Even price fixing and similar agreements that are deemed "per se" unlawful are so designated because a court has determined that such a restraint is so inherently anticompetitive that no further analysis is required.

The common thread in these antitrust violations is economic in nature: Does the condemned activity actually harm competition?

However, there are elements of the antitrust statutes that do not turn on economic analysis, where violations come with stiff penalties: in some cases, more than $50,000 per day. The U.S. Federal Trade Commission and U.S. Department of Justice have stepped up enforcement of these statutory requirements.

Active Investing Requires a Filing

On September 18, 2024, the FTC issued a consent decree in which GameStop CEO Ryan Cohen agreed to pay $985,320 to settle charges that his acquisition of Wells Fargo & Company stock violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The HSR Act provides that if parties are engaged in a merger or acquisition involving more than $119.5 million (the threshold is adjusted annually), they must report the transaction to the FTC and DOJ and wait a certain period of time before closing it. This rule even applies to some purchases of stock where the acquirer obtains less than a controlling position. In most cases, the mere purchase of stock by a capitalist or investor does not raise antitrust concerns, and the HSR Act includes an exemption from reporting for purely passive investors who own less than 10 percent of the stock of a company. However, if a passive investor becomes active, then the transaction must be reported. And those lines between active and passive can be thin.

Such was the case with Cohen. His 2018 acquisition of Wells Fargo stock passed the monetary threshold for reporting but resulted in him holding less than 10 percent of the company shares. However, the FTC alleged in its complaint that Cohen did not qualify for the investment-only exemption from the HSR Act because he intended to influence the operations of the business and was not merely a passive investor. He allegedly asked to be placed on the Board of Directors, maintained periodic communications with the CEO for two years after the stock acquisition, and described how he might help Wells Fargo improve its operations, technology, and mobile app. This was enough for the FTC to conclude that Cohen was not making the purchase for investment purposes only. Cohen made a corrective HSR filing in 2021, and his acquisition was not challenged. Although his fine represented a substantial downward departure from the maximum daily fine that he could have incurred between his 2018 share purchase and his 2021 corrective filing, the enforcement demonstrates the FTC's vigilance in enforcing the HSR statute regardless of the economic impact of the violation.

No Jumping the HSR Gun

On August 5, 2024, the DOJ brought a complaint against Legends Hospitality Parent Holdings, LLC, a venue services company, related to its acquisition of ASM Global, Inc. ("ASM"), a venue management company. The DOJ conducted a thorough review of the transaction and even issued a "Second Request," extending the review for nearly six months, ultimately deciding not to challenge the merger. However, after the waiting period expired, the DOJ filed a complaint and consent decree, charging Legends with gun jumping.

The HSR Act prohibits companies from integrating prior to the end of the waiting period, regardless of whether there is a competitive effect. Integrating prior to closing is referred to as "gun jumping," and can occur when the acquiring company starts exercising control over the target. While there can be some modest coordinated planning between the buyer and the target while the waiting period is in effect, the line is again fairly thin.

According to the complaint, during the waiting period, Legends allowed ASM to continue managing a venue even after Legends won a bid to manage it. Legends also sought to prevent the two companies from making competing bids for a management contract, and to jointly bid on another opportunity. None of this conduct was deemed to be a substantive antitrust violation, but the DOJ alleged that the coordination between Legends and ASM constituted Legends effectively taking control of ASM before the waiting period expired. Legends agreed to settle the case for $3.5 million.

No Interlocking Directorates

The agencies also have placed a greater emphasis on enforcing interlocking directorates, which are prohibited by Section 8 of the Clayton Act. Section 8 prohibits the same person from serving on boards of companies that compete with one another, except in limited circumstances where that person's involvement in one of the companies is de minimis. The agencies have adopted a so-called "deputization" theory, which contends that if the same firm appoints different people to competing boards, it is as if the same person were serving on both boards. In 2023, the FTC reached a consent decree related to the partial acquisition of EQT Corporation by private equity firm Quantum Energy Partners. Quantum had a position in competing pipeline companies, and Quantum agreed as part of the consent decree not to serve on the board of the top seven Appalachian Basin natural gas companies without FTC approval. Similarly, as a result of DOJ investigations, two Pinterest directors resigned from the board of Nextdoor in 2023, and the DOJ in October 2022 issued a press release taking credit for the resignation of seven board members from five companies across multiple industries. No Sherman Act suit was ever filed in any of these cases, and there were never allegations of substantive antitrust violations.

The lesson from these recent decisions? While antitrust violations usually involve an adverse economic effect to find a violation, there are exceptions. Cases where no evidence of effect is required are less complicated and easier to win, and the agencies will continue to vigorously enforce them. Companies should consult with antitrust counsel as appropriate to ensure they are not violating these rules and potentially subjecting themselves to significant penalties.

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