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Private Antitrust Challenge to Equity Sponsor Club Bids

A private antitrust complaint challenging so-called "club bids" and other alleged anti-competitive practices was filed November 15, 2006 against many of the leading private equity firms. The complaint, *L.A. Murphy, et al. v. Kohlberg Kravis Roberts & Company, et al.*, 06 Civ. 13210, is a purported nationwide class action and has been assigned to Judge Louis Stanton in the U.S. District Court for the Southern District of New York. The defendants named are: Kohlberg Kravis Roberts & Company; Carlyle Group; Clayton, Dubilier & Rice; Silver Lake Partners; Blackstone Group; Bain Capital LLC; Thomas H. Lee Partners; Texas Pacific Group; Madison Dearborn Partners; Apollo Management LP; Providence Equity Partners; Merrill Lynch and Co., Inc.; and Warburg Pincus, LLC.

The complaint appears to draw on press accounts published in *The New York Times, The Wall Street Journal* and various trade publications after informal information requests were sent to a number of the private equity firms by the Department of Justice, and alleges that the equity firms violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by engaging in a "conspiracy in restraint of trade to artificially fix, maintain or stabilize prices of equity shares purchased by the Private Equity Defendants and their [unnamed] co-conspirators". The complaint alleges that the conspiracy was accomplished by, among other things, the formation of "clubs" for the purposes of bidding collectively in company buyout auctions, by agreeing to exchange information on bids and potential bids, by agreeing as to bids to be submitted and not submitted and by agreeing on bids at agreed upon prices. By and large, these allegations echo initial press accounts of theories that various commentators speculated could conceivably give rise to liability for club practices depending on specific facts alleged.

Two newer allegations included in the complaint but not included in the initial flurry of speculation, are allegations: 1) that the conspiracy was accomplished in part by "entering into banking arrangements to deprive competitive bidders of financing" and 2) that the private equity bidders agreed not to submit competitive bids once a definitive merger agreement had been signed between one group of private equity firms and a public company.

The complaint does not define a specific "market", nor does it allege that the defendants had large market shares or "market power" nor does it otherwise allege that the agreements it challenges violate the so-called "Rule of Reason." It is thus wholly dependent upon sufficiently alleging and demon-

strating that such agreements, if proven, were *per se* violations of the antitrust laws.[1] The complaint seeks treble damages for a class of "all persons whose own securities were purchased, or are in the process of being purchased, by any of the Private Equity Defendants in a going private transaction effective or starting July 1, 2003 or thereafter." It also seeks an injunction against continuation of the allegedly illegal practices.

The complaint is very thin on specific facts, although it does contain an Appendix listing several dozen "going private deals" and the private equity firms involved. It does not include any specific allegations that a particular bidder agreed to drop its bid in return for compensation or that a potential bidder agreed not to bid in return for a "sweetheart" deal elsewhere. Both of those scenarios were identified in the press by various commentators as potential theories of liability and went beyond the mere fact of joint bidding, a practice that, without more, is unlikely to be viewed as a *per se* antitrust violation. The required threshold for a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act is presently on review this term in the U.S. Supreme Court.

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[1] Section 1 of the Sherman Act literally bars "every contract, combination . . . or conspiracy, in restraint of trade. . . ." The courts have construed that language to be limited to prohibition of "unreasonable restraints." Proof of unreasonableness generally requires an analysis of the effect of the combination on competition in a properly defined market. Some combinations, such as an agreement among competitors to fix prices, have been held *per se* illegal without the need to assess market effects.