Antitrust, Vol. 38, No. 1, Fall 2023.

Private Equity, the Clayton Act, and the Hurdles of Private Plaintiff Enforcement of Section 8

BY ALEXANDER J. SWEATMAN

FEARS OF CONSOLIDATED CORPORATE power and economic domination by a small number of individuals and corporations were pervasive in the years leading up to the enactment of the Clayton Act. A congressional committee uncovered interlocking directorates among J.P Morgan & Co. and the largest financial institutions and investment banks in the United States, raising concerns of a collusive "money trust" that was entangled and interlaced at all levels of U.S. industry and society.[1] One of the chief ills of the money trust was appointing and abusing interlocking directorates on the boards of directors of competing corporations:

> It is manifestly improper and repugnant to the theory and practice of competition that the same person or members of the same firm shall undertake to act in such inconsistent capacities. […] When we find, as in a number of instances, the same man a director in a half dozen or more banks and trust companies all located in the same section of the same city, doing the same class of business and with a like set of associates similarly situated all belonging to the same group and representing the same class of interests, all further pretense of competition is use-less. For all practical purposes of competition such banks and trust companies may as well be consolidated into a single entity.[2]

Congress responded by passing the Clayton Act of 1914; the current iteration of Section 8 of the Act prohibits a "person" from simultaneously serving as a "director or officer in any two [competing] corporations."[3]

Now, nearly 110 years later, the government is taking aim at interlocking directorates instigated by another financial juggernaut: private equity. Exempt from many of the financial reporting rules required of publicly traded companies, private equity firms are estimated to control more than $6 trillion in assets in the United States alone.[4] Through their portfolio companies, private equity firms KKR, Blackstone, and Carlyle Group indirectly employ such a large number of individuals that, if taken together, those private equity firms would constitute America's third, fourth, and fifth largest employers, beaten out in size only by Walmart and Amazon.[5]

The past few years have borne witness to the Department of Justice's and the Federal Trade Commission's aggressive posture toward private equity. The DOJ issued civil investigative demands to Apollo, Blackstone, and KKR regarding overlapping board seats, committed to "aggressive action" against private equity investments that result in board interlocks among competitors, and promised to "ramp[] up efforts" and to "not hesitate" to break up interlocking directorates.[6] On August 16, 2023, the FTC filed its first Section 8 case in 40 years against private equity firm Quantum Energy Partners.[7] The FTC's demand that Quantum relinquish any rights to a seat on its competitor's board furthered the FTC's promise to "reactivate Section 8 and effectively put market participants back on notice."[8]

However, the government is not the sole enforcer of Section 8; private litigants also may enforce the Clayton Act and "[i]t is well recognized that private enforcement of [antitrust] laws is a necessary supplement to government action."[9] Though sparsely litigated, the Clayton Act permits private plaintiffs to seek monetary damages and injunctive relief for Section 8 violations, which are considered per se illegal.

Private litigants may bring an array of Section 8 suits, ranging from individual shareholder actions to derivative suits. However, private plaintiffs face particularly steep challenges, especially in the private equity context because of the myriad of unsettled and open questions concerning the reach and interpretation of the Clayton Act when applied to private equity fund structure. Whether viewed as corporate raiders or economic saviors,[10] private equity dominates extensive swaths of the U.S. corporate realm and economy; this article seeks to widen the aperture beyond the government enforcement jurisdiction to canvass the landscape of, and analyze the hurdles to, private plaintiff enforcement of Section 8.

What is Private Equity and Why all the Section 8 Scrutiny?

Private equity firms typically raise money from large institutional investors such as pension funds, endowments, sovereign wealth funds, and high net worth individuals. The raised capital is put into a fund, usually a limited partnership, which then uses the pooled fund of institutional investor contributions, and usually a high amount of leverage or debt (hence the term leveraged buyout or "LBO") to acquire a controlling stake in a "portfolio company." The upshot is to make money for the fund and its investors by increasing the

Alexander J. Sweatman is an associate in Cafferty Clobes Meriwether & Sprengel's Chicago office and focuses his practice on plaintiff-side antitrust and class action litigation.

portfolio company's profitability by a variety of means, such as increasing efficiency, restructuring, improving management, or divesting unprofitable portions of the business.[11] The private equity firm may own the portfolio company for a period of time, hold the corporation as an investment, or eventually sell the portfolio company or conduct an initial public offering.

What is unique to private equity that lends itself to Section 8 scrutiny is that private equity firms often appoint one or more of their own employees to the boards of their portfolio companies and are frequently involved in their management.[12] A private equity fund opens itself up to Section 8 liability if it invests in competing portfolio companies and places the same individuals, or in some cases even different individuals affiliated with the same fund, onto the boards of those competing companies. Such an interlock can lead to the potential for collusion between competitors, including through sharing competitively sensitive information.

Section 8 and Proxy Wars—Defensive Use of Section 8 by a Target Company

Corporations sometimes wield Section 8 in an attempt to ward off the placement of hostile or insurgent candidates tendered by activist investors in takeover battles. The target corporation usually pursues an injunction to block a proposed slate of directors or a board nomination by contending that the nominee serves on a competitor's board and that a successful tender would lead to an illegal interlock. Though private equity firms largely focus on acquiring private corporations, private equity firms sometimes conduct hostile takeovers to acquire public corporations, such as when KKR famously took over RJR Nabisco in 1988.[13] However, defensive use of Section 8 cases are largely unsuccessful because courts hold that a potential interlock *in the future* is too speculative an injury to warrant injunctive relief.[14] Others have held that a potential future interlock fails to constitute an antirust injury.

For example, in *Charming Shoppes v. Crescendo Partners II, L.P.,* the Eastern District of Pennsylvania denied a corporation's attempt to use Section 8 to prevent a private equity firm from running their slate of nominees for election to the company's board.[15] In that case, one of the private equity firm's proposed nominees sat on the board of a competing corporation.[16] Consequently, the corporation sought to enjoin the board election, alleging that the potential interlock would risk disclosure of its trade secrets to its competitor.[17] The court denied the injunction, holding that Section 8 was "not created as a vehicle for courts to sit in judgment of competitors in a proxy context" and that the company failed to allege or prove antitrust injury stemming from the interlock because the "antitrust laws were enacted for the protection of competition[,] not competitors."[18]

Charming Shoppes is criticized for being at odds with Section 8's prophylactic purpose to prevent interlocks prior to their occurrence and contradicting the Clayton Act's lenient injunctive relief standard that allows parties to seek an injunction for "threatened" loss or damage.[19] However, its conclusion is in line with other district courts that have held that target corporations of hostile takeovers fail to demonstrate antitrust standing because the potential takeover results *only in a threat* of an interlock.[20]

The hostile takeover cases implicate a broader public policy debate that reaches beyond whether the target corporation satisfied the standards to invoke injunctive relief based upon a future Section 8 violation. The cases illustrate the concern held by some courts that target corporations constitute a "poor private attorney general" that lack antitrust standing because they are the beneficiary, rather than the victim, of the antitrust violation.[21] Courts adherent to this reasoning balance the public policies of a "possible anti-trust injury versus the entrenchment of inefficient management and the harm to vindicating shareholder rights" and find an absence of antitrust injury because shareholders ultimately benefit from increased prices or decreased competition stemming from the merger.[22] Private litigants are likely to face hurdles with respect to target corporation antitrust standing when attempting to employ Section 8 as a defense to a private equity backed proxy contest.

However, a private litigant's defensive use of Section 8 to win a proxy war is not entirely off the table. In *Square D Co. v. Schneider S.A.*, the Southern District of New York denied the defendant's motion to dismiss plaintiff's Section 8 claims.[23] In that case, the Square D Company was the target of a hostile takeover attempt. Schneider attempted to obtain control of Square D by installing its own directors to Square D's board so that they would approve a merger between the two companies.[24] Square D employed Section 8 defensively, contending that Schneider's slate of nominees constituted Schneider's agents and, further, that many of the slate sat on the boards of competing corporations or other Schneider affiliated companies that competed with Square D.[25] The court enjoined the board election, and did not explicitly analyze antitrust standing, but rather found that the underlying policies of Section 8 to prevent "coordination of business decisions by competitors and the exchange of commercially sensitive information" supported Square D's Section 8 claim.[26] The court found that the allegations that the slate of nominees were the "agents" of and had a "business relationship" with Schneider were sufficient to state a Section 8 claim and held that "a cause of action under [Section 8] is stated where a company attempts to place on the board of a competitor individuals who are the agents of, and have an employment or business relationship with, such company."[27] Accordingly, *Square D* provides a counterweight to *Charming Shoppes* and has particular import when applied to the private equity realm. *Square D* leaves open the possibility for private litigants to allege sufficient facts demonstrating that a fund appointed nominee acts as the fund's "agent" or has a "business relationship" with the appointing fund to leverage a defensive use of Section 8 in a private equity backed hostile takeover.

Shareholder Derivative Suits

Shareholder suits alleging Section 8 violations must overcome Rule 23.1's pre-suit demand requirement and the business judgment rule, which protects director actions made in good faith. These requirements pose a significant obstacle to Section 8 shareholder litigants because plaintiffs must show at the pleading stage that: (1) the board lacked the ability to impartially handle the plaintiffs' objection to the interlocking directorate; and (2) the defendant knowingly and intentionally violated the antitrust laws.

For example, in *Robert F. Booth Trust v. Crowley*, the Seventh Circuit rejected a shareholder derivative suit alleging a Section 8 violation against Sears Roebuck & Co.[28] The derivative action arose in the wake of Sears' 2005 merger with Kmart. The plaintiffs alleged that the consolidated corporation possessed two directors that interlocked with a number of Sears' key competitors.[29] The shareholders further alleged that pre-suit demand would have been futile because Sears knew of the prohibited interlock when Sears nominated the individuals for re-election to the board.[30] The district court agreed, noting that the "record amply supported the inference" that the individuals who nominated the interlocked directors knew that the nominations would cause Sears to violate Section 8 and that "knowingly [causing] Sears to violate section 8 of the Clayton Act […] is not protected by the business judgment rule." In light of those facts, the court found that pre-suit demand would have been futile.[31]

On appeal, the Seventh Circuit rejected the claim, holding that the shareholders lacked standing to bring a derivative suit because they actually stood to benefit from the interlock. The Seventh Circuit found that the shareholders never suffered antitrust injury, holding that that none of the plaintiffs, nor any investors in Sears, were injured because "cooperation with a competitor [would] benefit the investors" and that the crux of antitrust law is to protect against "detriment [to] consumers." Because "no consumer complained about the other directorships held by members of Sears's board," the Seventh Circuit remanded the case with instructions for the district court to enter judgment in the defendant's favor.[32]

The District of Delaware reached a similar result in *In re eBay, Inc., Derivative Litig*. There, an eBay shareholder alleged that eBay violated Section 8 when it re-nominated an individual to its board that simultaneously served on the board of the N.Y. Times.[33] The shareholder's theory was that eBay and the N.Y. Times were "competitors" because eBay's online classifieds business competed with the N.Y. Times' online-classifieds platforms.[34] The court dismissed the plaintiff's Section 8 claim for failure to satisfy Rule 23.1's demand requirement because the shareholder's complaint failed to state facts supporting the claim that the directors "knowingly and intentionally" violated Section 8."[35] The court further held that the board's action was protected by the business judgment rule because the shareholder was "[w]ithout any factual basis to support the inference that eBay's board of directors knew that eBay and N.Y. Times were competitors that would trigger a violation of [Section 8]."[36] Last, the court held pre-suit demand was required because the shareholder failed to demonstrate that eBay's board lacked the ability to impartially handle his objection to the interlock.[37]

However, at least one court has held that the presence of interlocking management between a defendant parent corporation and its subsidiary coupled with the parent's control of the subsidiary's voting stock was sufficient to excuse demand. Though the shareholders' Section 8 claim in *In re Penn Cent. Sec. Litig*. was rendered moot by the resignation of the interlocked directors, the court held that the shareholders sufficiently alleged demand futility because of their allegations that their board was completely "controlled and dominated" by the defendant parent corporation.[38] There, the court held that the same individual serving as the CEO and president of both the defendant parent and subsidiary corporations at issue "suggested that the board would not be overly sympathetic" with the shareholder's demand.[39] Most critically, the parent's "position as an overwhelmingly dominant shareholder" of the subsidiary's voting stock was sufficient to show a level of control and domination that rendered demand futile.[40] Accordingly, a shareholder of a public company acquired by a private equity fund may be able to sufficiently plead demand futility based on a similar theory that the private equity fund dominates and controls the board of the plaintiff shareholder's corporation in addition to the board of the interlocked competing corporation.

Does Section 8 Apply to Non-Corporate Private Equity Funds and Portfolio Companies?

Section 8 forbids interlocking directorates among competing "corporations." However, the vast majority of private equity funds are formed as limited partnerships or limited liability companies (LLCs). This raises questions as to whether Section 8 applies to private equity funds organized as LLCs or limited partnerships or would reach interlocks between competing portfolio companies organized as non-corporate entities.

To illustrate, suppose a private equity fund acquires a controlling stake in two competing portfolio companies. One is a Delaware LLC, the other, a limited partnership. The fund then places an individual on the board of directors of the Delaware LLC and appoints the same individual as an officer or director of the limited partnership.[41]

A strict reading of Section 8 precludes a private litigant from challenging the interlock because the entities are not corporations. The fact that LLCs did not exist when the Clayton Act was signed into law in 1914 bolsters this argument.[42] However, there is no case law squarely addressing whether Section 8 applies to interlocks between two competing LLCs or an interlock between an LLC competing with some other non-corporate entity, such as a limited

partnership. Nevertheless, the spirit and purpose of Section 8 is to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation for such violations through interlocking directorates."[43] This broad and prophylactic legislative purpose arguably supports application of Section 8 to any type of entity, as the risk of collusion and sharing of competitively sensitive information exists no matter the corporate form.

The DOJ has certainly taken this position. Based on its interpretation of Section 8's legislative history, the DOJ does not believe that "Congress intended to limit the application of Section 8 solely to corporations."[44] The government's recent aggressive posture toward interlocking directorates in the realm of private equity resulted in certain private equity affiliated directors resigning their board positions. But all of those instances involved interlocks between *corporations*.[45] Notably, the FTC's recent action against private equity firm Quantum Energy Partners further underscores the government's interpretation that Section 8 reaches non-corporate entities. There, the FTC prevented an interlock between Quantum, a limited partnership, and EQT, a corporation "put[ting] industry actors on notice that they must follow Section 8 no matter what specific form their business takes."[46] Nevertheless, the absence of any case law on Section 8's application to non-corporate entities foments additional uncertainty for private litigants eyeing potential Section 8 litigation.

Private Equity Fund Liability for Appointing "Deputies" to Portfolio Companies

On June 27, 2023, the FTC, with the DOJ's concurrence, proposed changes to the Hart-Scott-Rodino Act's ("HSR Act") premerger notification regulations to allow the FTC and DOJ to "more effectively and efficiently screen transactions for potential competition issues."[47] One of the "key proposals" in the notice of proposed rulemaking is additional disclosures regarding the "structure of involved entities such as private equity investments."[48] The antitrust regulators are seeking more information about private equity fund structure and ownership, and, for the first time, will now require "identification of the officers, directors, or 'board observers' (or in the case of unincorporated entities, individuals exercising similar functions) . . . to allow the Agencies to know of existing, prior, or potential interlocking directorates […]."[49]

These changes aim to increase Section 8 enforcement against private equity board interlocks by shining a light into the shadows of private equity fund structure at an earlier stage. While the government will obtain a clearer picture of interlocking directorates in the private equity realm, private litigants will continue to struggle to ascertain whether directors of portfolio companies are the "agents" or "deputies" of a private equity fund prior to filing suit.

Private equity's fund structure poses a significant challenge to private plaintiffs. Section 8 clearly prohibits the same *individual or natural person* from serving as an officer or director on competing portfolio companies.[50] However, it is unsettled whether a private equity firm is liable for an illegal interlock when a private equity fund invests in competing portfolio companies and places *different* individuals onto the boards of those portfolio companies to serve as the fund's representatives or agents. In such instances, private litigants may allege that the private equity fund *itself* constitutes a "person" or "director" under Section 8 because the officers or directors appointed by the fund to the boards of the competing portfolio companies are not acting in their "individual capacities," but rather acting as "deputies" of, or as the "puppets or instrumentalities of the [private equity fund's] will."[51]

Though rarely litigated, courts that subscribe to the "deputization theory" view interlocking "deputized" directors as "present[ing] every bit as much of a danger to competition as a single individual serving on both boards."[52] Under this view of Section 8, the risk of collusion, coordination of business plans, and exchanging commercially sensitive information exists irrespective of whether a private equity fund designates the same individual to the board of two competing portfolio companies or appoints two *different* individuals to the portfolio companies to represent its interests and manage the portfolio companies.[53]

To survive a motion to dismiss such a claim, a plaintiff must plead facts that allow a court to infer that the directors or officers of the portfolio companies are acting on behalf of the private equity firm. The facts alleged must show that the private equity firm constitutes the de-facto director or interlocked "person" on the competing portfolio companies. This is a significant hurdle, especially because plaintiffs will not have access to the new HSR disclosures regarding interlocking directorates and fund structure and organization or the recently announced Securities and Exchange Commission's heightened reporting requirements for private equity funds.[54] Though courts retain discretion to permit early discovery, any documents that a private equity fund produced in response to a civil investigative demand concerning interlocking directorates are likely not discoverable until after surviving dismissal, and public information regarding board composition and other aspects of private equity funds may be of little use to private litigants facing funds organized as partnerships or that are otherwise exempt from public reporting requirements.[55]

Reading International v. Oaktree Capital Management is instructive. There, private equity firm Oaktree Capital moved to dismiss the plaintiff's claims of a "deputized" interlock.[56] Oaktree Capital acquired minority interests in two large competing movie theater chains, Regal and Loews, placed its president on Loews' board, and appointed one of its senior executives to Regal's board.[57] The plaintiffs alleged that Oaktree Capital's board designations violated Section 8 and allowed the firm to exercise control over the competitor movie theater chains so that they could orchestrate illegal agreements with film distributors.[58]

The court denied Oaktree Capital's motion to dismiss, holding that the plaintiffs' allegations of a "carefully coordinated" strategy designed by "two of the most senior executives" of Oaktree Capital was "sufficient to suggest deputization."[59] The court further held that "proof of the existence of an agency relationship must await discovery."[60] Oaktree Capital's placement of its high-level executives to the boards of the competing portfolio companies was a significant fact in the case. In their response brief to Oaktree Capital's motion to dismiss, the plaintiffs argued in support of their deputization theory that "[i]t is patently impossible to suggest that the President and a Principal of Oaktree, when sitting on the boards of two companies in which Oaktree holds significant investment interest, are doing anything but protecting those interests."[61]

Other than *Reading International,* very few cases shed light on how to sufficiently plead a Section 8 deputization claim. It is also the only reported private plaintiff deputization case against a private equity defendant. Other cases, such as the Fourth Circuit's opinion in *Pocahontas Supreme Coal Co. v. Bethlehem*, emphasize the importance of the plaintiff being able to go beyond conclusory allegations that "simply track[]the statutory language" of Section 8 and to specifically "identify the directors or boards involved in such a 'deputization' scheme."[62] These cases again highlight the quandary plaintiffs face obtaining such information prior to filing suit to provide factual support for such allegations given that private equity firms and the private portfolio corporations that they manage are largely exempt from much of the financial disclosure requirements.

Securities Exchange Act Rule 16(b) Cases Support Section 8 "Deputization" Theory

The *Reading International* court observed that "no court has attached liability in an interlocking directorate situation [involving deputization], but neither has any court squarely rejected such a theory."[63] Private plaintiffs seeking additional support for a Section 8 deputization theory can point to the Second Circuit's opinion in *Feder v. Martin Marietta Corp*. [64]

Though not a Section 8 case, *Feder* accepted the "deputization" theory in the context of the Securities Exchange Act of 1934's Rule 16(b) short-swing profits provision.[65] The rule prohibits corporate insiders, including officers and directors, from taking advantage of their special access to internal and material corporate information to make short-term profits by trading their own corporation's stock within a 6-month timeframe.[66] In the 16(b) context, courts have held that a *corporation* can be liable for the short-swing profits that it realized by trading the stock of another corporation to which it has placed a deputized director.[67]

The *Feder* court found the Martin Marietta Corporation liable under the deputization theory when it placed its own chief executive officer on the board of directors of Sperry Rand Corporation to "acquire inside information concerning Sperry and [to] utilize such data for Martin Marietta's benefit[.]"[68] Martin Marietta owned substantial stock in Sperry Rand while its CEO served on the Sperry Rand Board. Martin Marietta purchased and sold the stock within six months of purchase, violating 16(b). Shareholders brought a derivative action and alleged that Martin Marietta was liable on the theory that its CEO was Martin Marietta's deputy on the board of Sperry Rand.[69] Much like a private plaintiff would allege in a deputized interlock action against a private equity firm, the plaintiff in *Feder* argued that Martin Marietta's designation of its own CEO to the Sperry board was designed to "protect Martin's investment in Sperry"[70]

One of the key facts supporting the court's holding that Martin Marietta deputized its CEO was that the corporation "formally consented to and approved [the] [dual] directorship."[71] Other facts pertinent to a finding of deputization in the 16(b) realm that can be applied in a Section 8 context include: (1) whether the alleged deputy exercised any power of approval concerning investments; (2) whether the deputy discussed operating details of the corporation's affairs with board members of the corporation that appointed the individual to the deputized position; and (3) whether the alleged deputy made purchases and sales with the advice or concurrence of the corporation that nominated the individual to the deputized position.[72]

In fact, the DOJ cited to Rule 16(b) cases, including *Feder*, in *United States v. Cleveland Trust Co*., to support the proposition that a corporation may be deemed to sit on the board of directors of another corporation through a "deputy."[73] The *Cleveland Trust* court noted that "[n]o view [was] intimated as to what applicability, if any, these section 16(b) decision[s] have to the proper construction of Section 8 of the Clayton Act, a statute with different language, purpose, and history."[74] Yet, the court acknowledged that the 16(b) cases recognize that the "issue of deputization is a question of fact to be settled case by case" and held that analysis and treatment of the issue would occur at trial on a full record.[75] However, the case never reached trial and commentators note that the court's abstention from ruling on Rule 16(b)'s applicability to Section 8 deputization allows for use of 16(b) reasoning to apply to interlocking directorate cases.[76] There is a dearth of case law outlining the evidence needed to prove that a director is working at the behest of a third party to such an extent that the *corporation* sits on the board, rather than the individual. Rule 16(b) cases may provide private plaintiffs with a useful roadmap of key facts for private litigants to allege and develop in Section 8 cases.

Foreign and Offshore Private Equity—Section 8's Extraterritorial Application

Private equity firms frequently organize offshore funds to capitalize on favorable tax laws and liability protections for the fund's investors.[77] For example, the Cayman Islands is the largest foreign domicile for private equity funds and allows for funds to be established as corporations, limited

liability corporations, and limited partnerships.[78] Can a private plaintiff sue an offshore private equity fund for designating interlocked directors (either direct or "deputized") on its competing U.S. portfolio companies?

Few courts have grappled with Section 8's extraterritorial application to foreign corporations or business entities. In *Borg-Warner Corp. v.FTC*, the FTC challenged an interlocking directorate between Bosch, a German corporation, and Borg-Warner, a U.S. automotive parts supplier. There, Bosch placed two of its directors onto Borg-Warner's board.[79] The FTC alleged a Section 8 violation because Bosch directly competed with Borg-Warner's automotive parts business in the United States via a wholly owned subsidiary.[80] The FTC enjoined Borg-Warner and Bosch from having interlocking directorates for ten years; however, the FTC's order was ultimately reversed by the Second Circuit because Borg-Warner sold its automotive parts business, nullifying any "cognizable danger of recurrent violation" of Section 8.[81] Consequently, the court did not address whether Section 8's reach applied to an interlock with a foreign corporation operating a wholly owned subsidiary in the United States.

In 2016, the DOJ raised concerns of an interlocking directorate between two British financial corporations that operated in the United States.[82] Prior to the DOJ's intervention, the transaction would have involved ICAP, a company providing electronic trading platforms, would have acquired a 19.9 percent interest in and the right to nominate a member to the board of Tullett Prebon, a provider of electronic brokerage services.[83] Because the two corporations would continue to compete after the transaction, the DOJ interceded because of its concerns that ICAP's ability to nominate a Tullett Prebon board member would create an interlocking directorate and create a "cozy relationship among competitors."[84]

The enforcement action is significant because Section 8 was applied to two foreign-based corporations with U.S. operations, providing support for the proposition that offshore business entities are within Section 8's reach. Further, the action is notable because it inferentially supports a "deputization" theory against a foreign-based corporation. The DOJ did not explicitly state a concern that the *same individual* would serve on the board of ICAP and Tullett Prebon, but rather that ICAP had the *ability to nominate a director* to a competing entity's board.[85] To that point, the revised deal prohibited ICAP from having *any right* to nominate a Tullett Prebon board member, rather than simply requiring that ICAP avoid a direct interlock when it exercised its board appointment rights.

Further, the Foreign Trade Antitrust Improvement Act of 1982 (the "FTAIA"), which requires that foreign anticompetitive conduct have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce, applies only to Sherman Act claims and does not place any jurisdictional limitations on claims alleging substantive violations of the Clayton Act.[86] In addition, the text of Section 8 contains no limitations on its foreign reach, only requiring that the interlocked "corporations" be "engaged in whole or in part in commerce."[87] Still, as illustrated in the DOJ and FTC enforcement actions, private plaintiffs would have to point to some type of harm occurring in the United States resulting from the interlocking directorate to establish antitrust standing, such as the foreign entity's control over a subsidiary that competes directly with a U.S entity, as in *Borg-Warner*. Even assuming Section 8 applies to foreign *corporations*, the same arguments that Section 8 does not apply to domestic limited partnerships or LLCs could be marshalled against private litigants bringing Section 8 claims against offshore private equity funds organized under foreign limited partnership or limited liability company statutes.

Foreign Private Equity in *In Re Packaged Seafood Antitrust Litigation*

Recent litigation in *In re Packaged Seafood Antitrust Litigation* illustrates the evidence and facts necessary to establish an agency relationship between a foreign private equity firm and its domestic portfolio company.

The plaintiffs in *Packaged Seafood* alleged a conspiracy to fix the prices of packaged seafood against three major tuna producers and their parent corporations.[88] One of the defendants, Bumble Bee Foods LLC, was a portfolio company of Lion Capital LLP, a British private equity firm. After purchasing Bumble Bee, Lion Capital appointed its own partners to Bumble Bee's board, "provided strategic direction to Bumble Bee at the Board Level," and "comprised the majority of the Bumble Bee Board."[89] Lion Capital moved for summary judgment, arguing that it did not participate in the price fixing conspiracy and could not be held vicariously liable for the actions of its portfolio company for engaging in "normal investment activities as a private equity firm."[90]

Nevertheless, on August 18, 2023, the Southern District of California largely dismissed the Lion Capital entities' motion for summary judgment, holding that the plaintiffs submitted sufficient evidence to raise triable issues as to whether Lion Capital entities *directly* participated in the conspiracy, but left unresolved whether Lion Capital and its wholly owned U.S. based registered investment advisor could be held vicariously liable for Bumble Bee's conduct.[91]

Both the court's Order and the parties' summary judgment briefing provide a factual framework for private litigants analyzing whether a portfolio company constitutes an agent of a private equity firm (domestic or foreign) and may also be employed to support a "deputization" argument in the Section 8 context. For instance, the court noted that Lion Capital partners conducted "regular meetings" with Bumble Bee management, participated in "hour long monthly calls" to review financial reports from Bumble Bee's CFO, received daily emails with detailed sales reports, and were "closely involved in Bumble Bee pricing strategy."[92] Plaintiffs further alleged that the terms of the management services agreement between Lion Capital and Bumble Bee

demonstrated an agency relationship and pointed to Lion Capital's domination of Bumble Bee's board as well as Lion Capital's partner statements and general investment strategy that evidenced a close "partnering with management teams."[93]

Conclusion

Private plaintiffs face significant uncertainties in Section 8 cases. In the hostile takeover and proxy war context, private plaintiffs face court decisions that are at odds with each other concerning whether the potential for an interlocking directorate constitutes an antitrust injury or poses a risk imminent enough to warrant injunctive relief. Then, upon creation of an interlock, shareholders must allege, at the pleading stage, that the board knowingly violated the antitrust laws by creating the interlock, satisfy the rigorous strictures of F.R.C.P 23.1's pre-suit demand requirement, and demonstrate an injury to the shareholders stemming from the interlock.

Private equity's fund structure and limited public reporting requirements compounds these challenges, as litigants face an absence of binding precedent concerning Section 8's application to LLCs and limited partnerships as well as precedent illuminating Section 8's extraterritorial reach to foreign corporate and non-corporate entities. Last, the viability of the "deputization theory" under Section 8 remains largely unaddressed, and though the theory found acceptance in the Securities Exchange Act Section 16(b) case law, the dearth of precedent for its application under the Clayton Act generates additional uncertainty for private plaintiffs seeking to enforce Section 8. ■

---

[1] Arthur H. Travers, Jr., *Interlocks in Corporate Management and the Antitrust Laws*, 46 Tex. L. Rev. 819, 826-29 (1969).

[2] H.R. Rep. No. 62-1593, at 140 (1913).

[3] 15 U.S.C. § 19(a)(1).

[4] What do I Need to Know Before Starting a Private Fund? https://www.sec.gov/education/capitalraising/building-blocks/private-fund; Chris Morran and Daniel Petty, *What Private Equity Firms Are and How they Operate,* ProPublica, Aug. 3, 2022, https://www.propublica.org/article/what-is-private-equity.

[5] Brendan Ballou, Plunder: Private Equity's Plan to Pillage America (1st ed. 2023); *see also* American Investment Council, *Economic Contribution of the US Private Equity Sector in 2022* (noting that, in 2022, the U.S. private equity sector directly employed 12 million workers earning $1 trillion in wages and benefits and that 85% of private equity backed business were small business with fewer than 500 employees).

[6] Private Equity Wire, US DOJ Probes Blackstone, Apollo and KKR & Co on Overlapping board Seats, Oct. 31, 2022, https://www.privateequitywire.co.uk/2022/10/31/318133/us-doj-probes-blackstone-apollo-and-kkr-co-overlapping-board-seats; *see* Deputy Assistant Attorney General Andrew Forman, The Importance of Vigorous Antitrust Enforcement in Health Care, Keynote at the ABA's Antitrust in Healthcare Conference (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust; *see also* Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (April 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[7] Press Release, Federal Trade Commission, FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal (Aug. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt.

[8] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, In the Matter of EQT Corporation, File No. 221-0212 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf

[9] In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 321 (3d Cir. 2008).

[10] Makan Delrahim, *Antitrust Attacks on Private Equity Hurt Consumers: Regulators ignore research showing their investments promote competition and increase productivity*, The Wall Street Journal, July 31, 2022, https://www.wsj.com/articles/antitrust-attacks-on-private-equity-hurt-consumers-lina-khan-ftc-recession-competition-management-expertise-capital-11659271442.

[11] Chris Morran and Daniel Petty, *What Private Equity Firms Are and How they Operate,* ProPublica, Aug 3, 2022, https://www.propublica.org/article/what-is-private-equity.

[12] Julia Beskin and Samantha Tantko, *Fiduciary Duties of Directors Appointed by Private Equity Firms: Pitfalls and Best Practices,* Financier Worldwide Magazine, Oct 2019, https://www.financierworldwide.com/fiduciary-duties-of-directors-appointed-by-private-equity-firms-pitfalls-and-best-practices; What Do I Need to Know Before Starting a Private Fund?, https://www.sec.gov/education/capitalraising/building-blocks/private-fund.

[13] Janet Key, *$25 Billion Nabisco Sale Largest Takeover*, Chi. Trib., Dec. 1, 1988, https://www.chicagotribune.com/news/ct-xpm-1988-12-01-8802210125-story.html.

[14] General Fireproofing Co. v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971).

[15] Charming Shoppes v. Crescendo Partners II, L.P., 557 F. Supp. 2d 621, 630 (E.D. Pa. 2008).

[16] *Id.* at 629.

[17] *Id.*

[18] *Id.*at 630 (internal quotation and citation omitted).

[19] Joseph Larson and Nathaniel Asker, *Charming Shoppes and the Issue of Standing under Section 8,* Global Competition Policy, Nov. 2008, https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Larson-Nov-08_2_.pdf; 15 U.S.C. § 26.

[20] *See* Barnup & Sims, Inc. v. Posner, 688 F. Supp. 1532, 1534-35 (S.D. Fla. 1988); General Fireproofing v. Wyman, 444 F.2d 391, 393 (2d Cir. 1971) (holding that the plaintiff corporation could not use Section 8 as a basis to enjoin a board member of a competing corporation from placing himself onto the plaintiff corporation's board because the threat of harm was too attenuated to warrant an injunction).

[21] Barnup & Sims, Inc. v. Posner, 688 F. Supp. at 1535; *see also* Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155 (1982).

[22] Barnup & Sims, Inc. v. Posner, 688 F. Supp. at 1534-35.

[23] Square D. Co. v. Schneider S.A., 760 F. Supp. 362, 368 (S.D.N.Y. 1991).

[24] *Id.* at 364.

[25] *Id.* at 366-67.

[26] *Id.* at 366.

[27] *Id.* at 367.

[28] Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012).

[29] *Id.* at 316.

[30] *Id*; Robert F. Booth Trust v. Crowley, 09C5314, 2010 WL 748201, at *2 (N.D. Ill. Feb. 26, 2010), rev'd and remanded sub nom. Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012).

[31] *Id*. at *10.

[32] Robert F. Booth Trust, 687 F.3d at 317.

[33] In re eBay, Inc., Derivative Litig., CIV. 10-470-LPS, 2011 WL 3880924, at *1 (D. Del. Sept. 2, 2011).

[34] *Id.* at *10.

[35] *Id.* at *7.

[36] *Id.*

[37] *Id*. at *11.

[38] In re Penn Cent. Sec. Litig., 367 F. Supp. 1158, 1164-65 (E.D. Pa. 1973).

[39] *Id.* at 1164.

[40] *Id.* at 1165.

[41] A "direct interlock" occurs when the *same individual* serves simultaneously as an officer or director on the board of two or more competing corporations. An "indirect interlock" or "deputization theory" is when two *different individuals* serve as officers or directors on competing corporations, but both act on behalf of the same third party, such as when a private equity fund places two different individuals on the board of its competing portfolio companies. *See* Michael E. Jacobs, *Combating Anticompetitive Interlocks*: *Section 8 of the Clayton Act as a Template for Small and Emerging Economies*, 37 Fordham Intl. L. J. 643, 649-50 (2014).

[42] Although forms of the limited partnership existed in the early 1900s in the United States, the Commission on Uniform State Laws did not approve the first Uniform Limited Partnership Act (ULPA) until 1916. *See* § 18:1. Nature and sources of Limited Partnership Law, Partnership Law & Practice § 18:1 (2022-2023); the first LLC statute was not enacted until 1977 and most states did not enact LLC statutes until the 1990s. *See also* Sandra Feldman, Understanding LLC Law: Its Past and its Present, Sept. 30, 2021, https://www.wolterskluwer.com/en/expert-insights/understanding-llc-law-its-past-and-its-present#:~:text=Introduction,the%20United%20States%20until%201977.

[43] United States v. Sears, Roebuck & Co, 111 F. Supp. 614, 616 (S.D.N.Y. 1953)

[44] Assistant Attorney General Antitrust Division Makan Delrahim, Don't "Take the Money and Run": Antitrust in the Financial Sector, Keynote at Fordham University School of Law, Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019), https://www.justice.gov/opa/speech/file/1159346/download; *see* 88 Fed Reg. 42189 (June 29, 2023) at n. 34 (noting that "[a]lthough Section 8 does not technically apply to unincorporated entities, information sharing and coordination can still raise concerns under Section 1 of the Sherman Act.").

[45] Press Release, U.S. Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns About Potentially Illegal Interlocking Directorates (Oct. 19, 2022) (noting resignations of private equity affiliated directors from Thoma Bravo and Prosus), https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-potentially. *See also*, Press Release, U.S. Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023) (noting resignations of additional private equity affiliated directors from Apollo Global Management, Inc. and Thoma Bravo), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

[46] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya, In the Matter of EQT Corporation, File No. 221-0212 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf.

[47] See Press Release, Federal Trade Commission, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27,2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[48] *Id; see also* Stefania Palma, *New US Antitrust Guidance Puts Private Equity and Tech Deals in Focus*, The Financial Times, July 19, 2023, https://www.ft.com/content/8b4907ba-742c-4dfb-9dd0-0a5925f4856c.

[49] 88 Fed Reg. 42189 (June 29, 2023).

[50] 15 U.S.C. § 19 ("no person shall, at the same time, serve as a director or officer in any two [competing] corporations.").

[51] Reading Int'l. v. Oaktree Capital Mgt. LLC, 317 F. Supp. 2d 301, 331 (S.D.N.Y 2003).

[52] *Id*. at 329.

[53] *Id*. at 331.

[54] Press Release, U.S. Securities and Exchange Commission, SEC Adopts Amendments to Enhance Private Fund Reporting (May 3, 2023) ("Private funds today are ever more interconnected with our broader capital markets. They also nearly have tripled in size in the last decade. This makes visibility into these funds ever more important. Today's amendments to Form PF will enhance visibility into private funds and help protect investors and promote financial stability."), https://www.sec.gov/news/press-release/2023-86. The HSR and SEC disclosures are confidential and FOIA exempt.

[55] *See, e.g.,* In re NASDAQ Mkt.-Makers Antitrust Litig., 929 F. Supp. 723, 727 (S.D.N.Y. 1996) (compelling production of the defendants' responses to DOJ's civil investigative demands).

[56] *Reading Int'l v. Oaktree Capital Management*, 317 F. Supp. 2d 301 at 332.

[57] *Id.* at 308-09

[58] *Id*.

[59] *Id.* at 332.

[60] *Id*.

[61] *Id; see also* Pltfs' Mem. Of law in Opp. To Def. Mot. to Dismiss the Compl. at 65, June 20, 2003. Case No. 03-CV-1895 (GEL) (THK), ECF No. 36.

[62] Pocahontas Sup. Coal Co., Inc. v. Bethlehem Steel Corp., 828 F. 2d 2111, 217 (4th Cir. 1987).

[63] *Reading Int'l*, 317 F. Supp. 2d at 328.

[64] Feder, 406 F.2d 260, 262 (2d Cir. 1969), *cert. denied,* 396 U.S. 1036 (1970).

[65] *Id.*

[66] *Id.*

[67] *Id.* at 266. *See also* Blau v. Lehman, 368 U.S. 403, 410 (1962).

[68] *Feder v. Martin Marietta Corp*., 406 F.2d at 264.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 265.

[72] *Id*. *See also* § 11:15. Competition—What corporate entities are involved?—"Deputization", Corp. Counsel's Antitrust Deskbook § 11:15 (Oct. 2022); Lear Landa, Gregory S. Rowland, and Michael S. Hong, Advising Private Funds: A Comprehensive Guide to Representing Hedge Funds, Private Equity Funds and their Advisors, § 25:25. Directors by "deputization", Advising Private Funds § 25:25 (Dec. 2022).

[73] United States v. Cleveland Trust Co., 392 F. Supp. 699, 711-712 (N.D. Ohio 1974), *aff'd* 513 F.2d 633 (6th Cir. 1975).

[74] *Id.* at 711.

[75] *Id*. at 712.

[76] Robert Jay Preminger, *Deputization and Parent-Subsidiary Interlocks Under Section 8 of the Clayton Act,* 58 Wash. U L.Q. 943, 963-64 (1981).

[77] Larry Jordan Rowe and Justin T Kliger, Private Equity in United States: Market and Regulatory Overview, Practical Law Country Q&A 1-500-5474 (June 1, 2023), https://1.next.westlaw.com/Document/Id4aecb791cb511e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default).

[78] Atif Azher, Private Equity (Fund Formation) Cayman Islands, at 5–6, https://www.stuartslaw.com/cms/document/2023-private-equity-fund-formation—cayman-islands.pdf.

[79] Borg-Warner Corp v. FTC, 746 F.2d 108, 109-10 (2d Cir. 1984).

[80] *Id.*

[81] Matter of Borg-Warner Corp., 101 F.T.C., 863 1983 WL 486332, at *55; *Borg-Warner Corp v. FTC,* 746 F.2d at 110.

[82] Press Release, U.S. Dep't of Justice, Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates (July 14, 2015), https://www.justice.gov/opa/pr/

tullett-prebon-and-icap-restructure-transaction-after-justice-department-expresses concerns#:~:text=The%20Department%20of%20Justice%20announced,by%20creating%20an%20interlocking%20directorate.

[83] *Id.*

[84] *Id*.

[85] *Id.*

[86] Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 246-47 (S.D.N.Y. 2008).

[87] 15 U.S.C. § 6(a); 15 U.S.C. § 19(a)(1)(A).

[88] In re Packaged Seafood Products Antitrust Litig., No. 15-MD-2670 DMS (MSB), 2023 WL 5344133, at *1-2 (S.D. Cal. Aug. 18, 2023).

[89] *Id*. at *11; *20 (internal quotation omitted).

[90] *Id.* at *2

[91] *Id*. at *19.

[92] *Id.* at *11.

[93] Pls.' Opp'n to Lion Entities' Mot. For Summ. Judg. at 29-31, May 11, 2023, Case No. 3:15-md-02670-DMS-MSB, ECF No. 3068.