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When Private Equity Firms Face U.S. Antitrust Liability for Portfolio Company Conduct

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In multiple recent litigations, private equity (PE) firms have faced antitrust conspiracy claims under Section 1 of the Sherman Act arising—at least primarily—out of alleged anticompetitive conduct by their portfolio companies, rather than the PE firms themselves. These cases raise important questions for PE firms and their lawyers to consider as they evaluate risks from portfolio company operations and structure their investment and management relationships. This article discusses rulings from two recent cases—In re Packaged Seafood Products Antitrust Litigation and In re Liquid Aluminum Sulfate Antitrust Litigation—and the standards courts applied to determine whether a PE parent had liability based on portfolio company conduct.

It is clear that if a PE firm is actively participating in an antitrust conspiracy, then it will face liability. For example, in cartel cases, if PE partners or employees are attending cartel meetings on behalf of their firm and entering into price-fixing agreements with a portfolio company's competitor (or the competitor's parent), the PE parent can expect to be treated as any other conspirator. But what happens when the PE parent is not at the cartel meeting and is not a party to any agreement with a competitor? In cases where evidence ties only a portfolio company directly to an antitrust violation, but does not show direct participation by the PE parent, evaluating the parent's potential antitrust liability depends heavily on the details of the PE-portfolio company relationship.

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