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September 20, 2011

Antitrust Standing Rules for Hostile Takeover Targets

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In hostile tender offers, the target company may assert that its acquisition by an unwanted suitor would violate Section 7 of the Clayton Act and seek protection from a federal district court in the form of a preliminary and permanent injunction blocking the suitor from continuing with its offer. The putative antitrust violation may arise from a long-standing relationship in the marketplace of the suitor and the target, or the target may attempt to create an antitrust problem where none before existed by quickly acquiring new lines of business or new business locations that would be problematic for the offeror to acquire.

Serious antitrust problems that cannot be cured by divestiture or other means, while relatively rare, can end a hostile takeover.[1] But the prospect of being successful is not the only reason to commence an antitrust challenge. Even a target that has little hope of prevailing may have a strong incentive to bring an antitrust action against it suitor, since the prosecution of a merger antitrust action can provide the target with considerable time to pursue its other takeover defenses or to find a "white knight."

In light of the incentive to mount an antitrust challenge to an unwanted takeover even when the probability of success is low, not to mention the cost this tactic imposes on the judicial system, some courts have developed a wariness to antitrust takeover defenses. As Judge Friendly observed in *Missouri Portland Cement Co. v. Cargill, Inc.*:[2]

> Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so

[1] *See, e.g.*, Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989); Marathon Oil Co. v. Mobil Corp., 669 F.2d 378 (6th Cir. 1981); Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981).

[2] 498 F.2d 851 (2d Cir. 1974).

> change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown.[3]

On the other hand, there will be instances when the antitrust suit has merit.[4]

Should targets be allow to prosecute antitrust takeover defenses in spite of their bias in order to provide relief in those (perhaps few) instances where the target can make out its case? Or should all targets be denied their cause of action and with this relief in truly anticompetitive acquisitions?

Courts have addressed these questions under the rubric of antitrust standing. The following table summarizes the results by circuit, a mixed lot at best.

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[3] *Id*. at 854; *accord Grumman*, 665 F.2d at 11.

[4] *See, e.g.*, *Grumman*, 665 F.2d at 11 ("If the effect of a proposed takeover may be substantially to lessen competition, the target company is entitled to fend off its suitor. Our focus is therefore not upon Grumman's motivation for bringing this suit, but upon the adequacy of its preliminary showing that the proposed takeover will violate § 7."), *abrogated by* Consolidated Gold Fields, OLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989).

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Circuit	Standing	Cases
First	No	A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir.) (per curiam), *aff'g* 481 F. Supp. 1297, 1298 (D. Mass. 1980)
Second	Yes	Square D v. Schneider S.A., 760 F. Supp. 362 (S.D.N.Y. 1991) Consolidated Gold Fields PLC v. Minorco, 871 F.2d 252, 260 (2d Cir. 1989)
Third	No	Moore Corp. v. Wallace Computer Servs., Inc., 907 F. Supp. 1545 (D. Del. 1995)
Fourth	No	Burlington Indus. Inc. v. Edelman, 666 F. Supp. 799, 805-06 (M.D.N.C. 1987)
Fifth	No	Anago, Inc. v. Tecno Med. Prods., 976 F.2d 248 (5th Cir. 1992), *abrogating* A. Copeland Enters. v. Guste, Civ. A. No. 88-4706, 1988 WL 129318 (E.D. La. Nov. 28, 1988) Gearhart Indus., Inc. v. Smith Int'l, Inc., 592 F. Supp. 203, 211 n. 1 (N.D. Tex.), *mod. on other grounds*, 741 F.2d 707 (5th Cir. 1984)
Sixth	Yes (implicitly)	Marathon Oil Co. v. Mobil Corp., 669 F.2d 378 (6th Cir. 1981) Babcock & Wilcox Co. v. United Techs. Corp., 435 F. Supp. 1249 (N.D. Ohio 1977)
Seventh	Yes	Laidlaw Acquisition Corp. v. Mayflower Group, Inc., 636 F. Supp. 1513, 1516-17 (S.D. Ind. 1986) Whittaker Corp. v. Edgar, 535 F. Supp. 933, 950 (N.D. Ill.), *aff'd mem.,* Nos. 82-1305 & 1307 (7th Cir. 1982) Panter v. Marshall Field & Co., 646 F.2d 271, 297 (7th Cir. 1981) Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. (CCH) ¶ 62,717 (N.D. Ill. 1977)
Eight		No cases
Ninth	Mixed	Carter Hawley Hale Stores, Inc. v. The Limited, Inc., 587 F. Supp. 246, 249-50 (C.D. Ca. 1984) (no standing)
Tenth	No	Central National Bank v. Rainblot, 720 F.2d 1183, 1187 (10th Cir. 1983)
Eleventh	No	Burnup & Sims, Inc. v. Posner, 688 F. Supp. 1532 (S.D. Fla. 1988)
D.C.	No	Atl. Coast Holdings, Inc. v. Mesa Air Group, Inc., 295 F. Supp. 2d. 75 (D.D.C. 2003) (but limiting holding to situation where target shareholders must approve the challenged transaction before it can be consummated)
Federal		No cases