

To Our Clients

Takeovers: Antitrust Pendulum Swings Back

The Second Circuit decision in the Grumman case is a major change in attitude toward antitrust defenses by takeover targets. The Court said:

Mindful that target companies are quick to seek refuge in [the antitrust laws] against an unfriendly takeover . . . , we also recognize that when a takeover threatens horizontal integration, the courts have a clear duty to weigh carefully the claim for a preliminary injunction . . . even though the true concerns of the 'private attorney general' may be more 'private' than 'attorney general.' 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 [the target's] motivation for bringing this suit, but upon the adequacy of its preliminary showing that the proposed takeover will violate [the antitrust laws].

Elimination of horizontal competition in any substantial market is again a "show stopper." In any particular takeover the questions will be market definition and the substantiality of the horizontal competition between the raider and the target.

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