Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

In the Matter of Rent-to-Own Market Allocation Scheme
Commission File No. 1910074
February 21, 2020

Summary

- The FTC uncovered evidence that three major rent-to-own players engaged in a market allocation scheme to close down stores that suppressed competition, but the agency is *not* asserting that this conduct was per se unlawful.
- The proposed settlement deprives affected families of direct notification by the companies of their wrongdoing. This goes against a core element of competitive markets: the dissemination of truthful information.
- There is clear evidence that a senior executive served on the board of a competitor. The Commission's complaint should have charged this as unlawful.

I dissent from the Commission's vote regarding three no-money, no-fault proposed orders with the big three major players in the rent-to-own business: Rent-a-Center, Inc. (NASDAQ: RCII), Aaron's, Inc. (NYSE: AAN), and Buddy's Newco, LLC. While I am pleased that we have uncovered difficult-to-detect misconduct, I am concerned our remedy is insufficient, that the analytical basis of the proposed settlements is flawed, and that the Commission is doing little to deter similar misconduct by others.

Background

Rent-a-Center, Aaron's, and Buddy's typically target low-income families seeking items for their homes, such as furniture or electronics. Unlike traditional installment sales contracts, rent-to-own companies "rent" an item to a consumer, who can then take ownership if all the required payments are made after a certain period of time. If the consumer is unable to make payments, they must return the good. Due to this unusual structure, rent-to-own companies have actually threatened customers who fail to make their payments with criminal theft.[1] The companies can even profit when a customer fails to complete the term, because the total price paid by the consumer over time may be far higher than the retail price for the goods.[2]

[1] Brian Highsmith & Margot Saunders, NATIONAL CONSUMER LAW CENTER, THE RENT-TO-OWN-RACKET: USING CRIMINAL COURTS TO COERCE PAYMENTS FROM VULNERABLE FAMILIES (Feb. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-rent-to-own-racket.pdf.

[2] This is because the total cost of ownership is often far greater than the cash price of the merchandise. While the monthly payments may be low, a consumer only acquires ownership at the end of all scheduled payments, which

This business model has resulted in consumers paying significantly high prices. Making matters worse, the industry has tended to prey on vulnerable populations, especially military families.[3] The industry has been on the FTC's radar for at least two decades, though the agency has struggled to address the risks posed by this business model.[4] Given the pre-existing concerns about abuse in the rent-to-own industry, it is even more worrisome that dwindling competition might further diminish the limited leverage that families have when signing a contract.

The Scheme Alleged in the Complaint

The FTC's investigation uncovered evidence of a market allocation scheme between rent-to-own chains with competing stores in multiple geographic markets: one competitor would agree to close a store and sell customer contracts in one geographic market in exchange for a competitor closing one of its stores and selling its customer contracts in another geographic market. The companies did not hold an open auction to sell off stores or inventory.

As noted in the Commission's Analysis to Aid Public Comment, the agency has evidence to suggest that there were stores that would not have otherwise been closed, including stores that were profitable. The companies also added non-compete provisions to the agreements to prevent a competitor from re-emerging in a local market for three years.

While not a primary focus of the agency's investigation, there was another troubling element with respect to Buddy's and Aaron's in this matter. Vintage Capital Management, a private equity outfit with a controlling interest in Buddy's, also was, at one time, a very large shareholder of Aaron's.[5] Mr. Brian Kahn, the managing partner and founder of Vintage Capital Management, served as a member of the board of directors of Aaron's at the same time his fund controlled Buddy's.[6] Some of the alleged market allocation schemes took place during the time of Mr. Kahn's service on Aaron's board.[7]

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typically last 12 to 24 months. When a consumer makes many payments but fails to complete the term, the rent-to-own company keeps the goods.

[3] *See* Written Testimony of Assistant Director Hollister K. Petraeus on behalf of the Consumer Financial Protection Bureau, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Nov. 3, 2011), https://www.consumerfinance.gov/about-us/newsroom/testimony-of-hollister-k-petraeus-before-the-senate-committee-on-banking-housing-and-urban-affairs/.

[4] *See* James M. Lacko et al., FED. TRADE COMM'N, BUREAU OF ECON. STAFF REP'T: SURVEY OF RENT-TO-OWN CUSTOMERS (Apr. 2000), https://www.ftc.gov/reports/survey-rent-own-customers. The FTC even caught Aaron's illegally spying on consumers via rental computers. *See* Press Release, Fed. Trade Comm'n, Aaron's Rent-To-Own Chain Settles FTC Charges That it Enabled Computer Spying by Franchisees (Oct. 22, 2013), https://www.ftc.gov/news-events/press-releases/2013/10/aarons-rent-own-chain-settles-ftc-charges-it-enabled-computer.

[5] Press Release, Aaron's Inc., Aaron's, Inc. Reaches Agreement With Vintage Capital Management; Brian R. Kahn and Matthew E. Avril to Join Aaron's Board of Directors (May 13, 2014), http://investor.aarons.com/news-releases/news-release-details/aarons-inc-reaches-agreement-vintage-capital-management.

[6] *Id. See also* MORRISON & FOERSTER LLP, *Aaron's Inc. and Vintage Capital Management, Inc.: Chronology of Events Surrounding Unsolicited Offer* at 4 (2014), http://media.mofo.com/files/uploads/Images/UV-Aarons-Vintage-Capital.pdf.

[7] Aaron's Compl. ¶15.

Analysis of Complaint and Remedy

When competitors agree to close stores in ways that lead to a division of local markets, this will typically be profitable for the companies and harmful to the consumers and employees whose lives are disrupted by store closures. I acknowledge that agencies like the FTC do not have unlimited resources. We cannot always investigate every detail of potential misconduct.

However, in this matter, the Commission did not analyze customer contract performance after the store closures, or analyze employee terminations and other critical information that would help to determine the harm inflicted on the public and the companies' ill-gotten gains. The investigation did not focus on whether the companies made any misrepresentations to employees about the rationale for the store closures or other details about closures and layoffs. We also do not know whether customers were deceived when told why they could no longer make payments at the original location where they signed their contract. It is reasonable to assume that some customers faced financial hardships from the market allocation scheme, but we cannot know precisely given the scope of our investigation.

With all of these unknowns, the Commission should not jump to a conclusion that the alleged unlawful conduct was victimless. Instead, we must approach a resolution that takes into account this uncertainty. There are several aspects here worth briefly discussing.

Notice to Victims. The Commission is not seeking any notifications to the employees or customers affected by potentially illegal store closures. Requiring a notice to employees and customers, even if it includes those that may not have been harmed, has important benefits, especially if any employee or customer was deceived or harmed in ways that we were unable to uncover.

A core benefit of notice is the dissemination of truthful information, which helps instill proper incentives in the marketplace. This is especially important in no-money, no-fault settlements like the ones here, because it allows market forces to impose some degree of accountability on wrongdoing firms: harmed consumers may prefer to do business with law-abiding companies instead of ones that flout the law.

Promoting the dissemination of truthful information is foundational to functioning markets and has been a bedrock of FTC policy for decades. Fulfilling that policy goal in a case like this one requires virtually no effort on the Commission's part – it is standard practice for lawbreakers to be ordered to conduct the notifications themselves,[8] with virtually no public resources. The statement by Chairman Simons and Commissioner Phillips appears to go against this principle, by advocating that the Commission deprive customers and employees from being notified directly by the companies about their misconduct, out of fear of being "overinclusive."

Overlapping Control. When a senior executive can sit on the board of a competitor and learn about its business strategy, this can lead to significant anticompetitive effects. For example, if a senior executive learns about the locations of planned store openings of a competitor through an affiliation on that competitor's board, she may advise the other company she is affiliated with to open

[8] *See e.g.*, *Fed. Trade Comm'n v. Cure Encapsulations, Inc.* FTC File No. 1723113 (Feb. 19, 2019); *Fed. Trade Comm'n v. Applied Food Sciences Inc.*, FTC File No. 1423054 (Sept. 10, 2014); *In re Henry Schein Practice Solutions, Inc*, Docket No. C-4575 (May 23, 2016).

locations in different markets to avoid competition. This is precisely the rationale behind the ban on interlocking directorates in Section 8 of the Clayton Act.

While the proposed orders against Buddy's and Aaron's ban overlaps on their boards, neither Mr. Kahn nor Vintage Capital Management are subject to these requirements. It is not clear whether the relief is adequate. While I appreciate that there is a ban in overlapping boards,[9] the Commission should have pursued a count charging Buddy's and Aaron's with engaging in an unfair method of competition in violation of the Section 5 of the Federal Trade Commission Act, pursuant to the Commission's 2015 Statement of Enforcement Principles.[10]

There is uncertainty in the market about compliance with the ban on overlapping boards.[11] Some may argue that limited liability companies (LLCs) are not bound by the Clayton Act's ban that applies to corporations. By not pleading a count condemning this overlap, the FTC has missed an opportunity to demonstrate that these overlaps are unlawful.

Per Se Liability. The Commission is not asserting that the store closure scheme was per se unlawful. Instead, the agency analyzed the scheme in a way that allowed the companies to attempt to justify why the conduct was not anticompetitive. While there is fairly limited case law guiding the appropriate legal analysis of the specific fact pattern here, the conduct has the same competitive effect as a straightforward market allocation scheme, which courts treat as per se unlawful. As the FTC and Department of Justice's Antitrust Guidelines for Collaborations Among Competitors describes, agreements to "share or divide markets by allocating customers, suppliers, territories or lines of commerce. . ." have been held per se illegal.[12]

The reason per se liability applies to these types of agreements is simple: certain agreements are so likely to harm competition and have no significant benefits that they do not warrant the time and expense necessary for a detailed rule of reason inquiry into their effects.[13] A rule of reason analysis is much costlier than a per se analysis, typically requiring expert testimony and evidence measuring

[9] I view the proposed order's ban on future interlocks as the bare minimum the Commission could possibly include in a remedy. Although the ban is broader than what Section 8 requires, since it applies regardless of the Section 8 statutory exemptions that would apply, the order would otherwise merely require Aaron's and Buddy's to abide by the law.
[10] While our investigation did not make a conclusive determination as to whether Mr. Kahn's actions were a violation of Section 8 of the Clayton Act's ban on interlocking directorates, the conduct meets the standards outlined in the Commission's 2015 Statement of Enforcement Principles on the use of the agency's 'stand alone' authority to prohibit unfair methods of competition under Section 5. *See* https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition.
[11] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Keynote Address at Fordham University School of Law, Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019) (noting that "[t]he use of the term "corporation" in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as [LLCs] or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional "corporation." To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities."), https://www.justice.gov/opa/speech/file/1159346/download.
[12] FED. TRADE COMM'N, & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 3 (Apr. 2000) (citing *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market allocation)), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
[13] *See Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n. 16 (1977).

anticompetitive effects. The level of detail in the analysis varies depending on the nature of the agreement and market circumstances.[14]

For defendants, the difference between per se and rule of reason analysis is enormous, since under a per se analysis only the existence of an agreement need be proved by a plaintiff – no justifications are allowed. Applying the wrong analysis to an allegedly illegal agreement can wreak havoc on our legal system and lead to poor outcomes.

For example, if companies sense that certain conduct is no longer likely to be treated as per se unlawful, they are more likely to engage in the conduct. Well-resourced companies can concoct justifications for their alleged conduct after they've been caught, with a net low risk of sanctions, creating an incentive for behavior that is almost always anticompetitive. This gives them an advantage over smaller and newer businesses that may not have the same guile and can also harm consumers and the companies' own employees in the process. Using a bright-line rule relying on per se liability in this case provides clear guidance to firms subject to that rule and also limits the transaction costs of enforcement.[15]

Conclusion

The proposed settlements are clearly inadequate. Because the Commission has voted to place the proposed orders on the public record for comment, I too look forward to any input the public may have on how the agency can improve the proposed orders and prevent repeating similar mistakes.

When wrongdoers wish to end an investigation by settlement, the FTC must be mindful of all of the potential harms inflicted on the public, rather than simply assuming there were none. When uncertainty is always analyzed in favor of the wrongdoer, this is a recipe for weak enforcement that does little to deter market distortions and undermines fair competition.

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[14] *See California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint").
[15] *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 31 (2015).