

## Hey Fintech: With the Antitrust Division Watching, Protect Yourself!

By **Leiv Blad Jr., Jeffrey Blumenfeld, Zarema A. Jaramillo, Jonathan L. Lewis, Jack Sidorov,** and **Allison M. Vissichelli**

### What You Need To Know:

- With the Antitrust Division watching, sellers need to protect themselves.
- Engaging with antitrust counsel early is key to identifying and managing risk.
- You can manage that risk by negotiating a hell or high water provision and/or a reverse breakup fee to protect your deal.

If you caught our last two client alerts—[Hey Fintech, the Antitrust Division Is Watching You!](#) and [Hey Fintech: Watch What You Say, and Be Mindful of What Others Say on Your Behalf](#)—then you know that the Antitrust Division has trained its sights on fintech deals in which incumbents buy up “nascent competitors” and that what you and others write about such deals is often grist for the antitrust enforcement mill. Now, one such deal is no longer in the Antitrust Division’s sights, but instead it is the buyer’s words featuring prominently in the effort to block the deal that is in the division’s line of fire. (The complaint is available [here](#).)

What’s the deal? The Antitrust Division filed an antitrust lawsuit to block Visa Inc.’s \$5.3 billion acquisition of Plaid Inc. In its complaint, the Antitrust Division says that Plaid is a threat to Visa because Plaid is developing an innovative new solution that would be a substitute for Visa’s online debit services. By acquiring Plaid, the Antitrust Division believes that Visa can “eliminate a nascent competitive threat that would likely result in substantial savings and more innovative online debit services for merchants and consumers.” (If you are wondering what a nascent competitor looks like, according to two antitrust professors

[C. Scott Hemphill and Tim Wu], it’s “a firm whose prospective innovation represents a serious, albeit uncertain, future threat to an incumbent.” For more from the professors on this topic, click [here](#).)

How can a nascent competitor like you protect yourself? As we discussed before, being able to identify early in the process potential issues with certain buyers can help you decide among suitors and negotiate deal protections in the deal you decide to close.

What deal protections can you negotiate? Consider a hell or high water provision.

With a hell or high water provision, the buyer is obligated, for example, “to use its best efforts, and to take any and all steps necessary, to eliminate each and every impediment under any antitrust, competition[,] or trade regulation law that is asserted” to close the transaction. Such provisions may be particularly useful where, for example, there are plants or mills that can be sold off in an effort to remedy the competitive concern. Such provisions may have limited applicability for fintech deals.

What other protections are available? Consider a reverse breakup fee.

With a reverse breakup fee, the buyer agrees to pay the seller a fee in the event the deal does not close because the necessary antitrust approvals could not be obtained. The point of such provisions is to provide the buyer with an incentive to resolve whatever antitrust issues may be raised to enable the deal to close and to compensate the seller in the event the deal does not close for antitrust reasons. (Negotiated breakup fees typically run about 4-5 percent of the value of the deal.)

The takeaway is to engage with antitrust counsel early in order to identify and manage risks. On that score, be sure to review our last two client alerts—[Hey Fintech, the Antitrust Division Is Watching You!](#) and [Hey Fintech: Watch What You Say, and Be Mindful of What Others Say on Your Behalf](#).

## Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

### **LEIV BLAD JR.**

Partner  
Co-Chair, Antitrust & Trade Regulation  
**T: 202.753.3820**  
[lblad@lowenstein.com](mailto:lblad@lowenstein.com)

### **JEFFREY BLUMENFELD**

Partner  
Co-Chair, Antitrust & Trade Regulation  
**T: 202.753.3810**  
[jblumenfeld@lowenstein.com](mailto:jblumenfeld@lowenstein.com)

### **ZAREMA A. JARAMILLO**

Partner  
**T: 202.753.3830**  
[zjaramillo@lowenstein.com](mailto:zjaramillo@lowenstein.com)

### **JONATHAN L. LEWIS**

Partner  
**T: 202.753.3824**  
[jlewis@lowenstein.com](mailto:jlewis@lowenstein.com)

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