Comment of the Open Markets Institute[*]

In the Matter of Rent-to-Own Store Swaps

Commission File No. 191 0074

March 27, 2020

Introduction

The rent-to-own industry targets low-income families who typically lack the savings and conventional credit to buy household goods outright. African Americans and residents of Southern states constitute a disproportionate segment of the industry's customers.[1] Rent-to-own firms offer contracts that grant the customer ownership if the required weekly or monthly payments are made for the full term of the contract, typically 12 to 24 months. These operators pitch their offers as enabling the acquisition of home furnishing, electronics, and appliances for individuals who might not otherwise be able to afford them. Critically, the industry describes these sales on credit transactions as rental agreements, ensuring that they are not covered by key federal and state consumer protections, including the Truth in Lending Act.[2] In practice, many customers end up paying several times more than they would at brick-and-mortar and online

[*] The Open Markets Institute is a nonprofit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and other members of the public.

[1] James M. Lacko et al., Fed. Trade Comm'n, Bureau of Econ. Staff Rep't: Survey of Rent-to-Own Customers at 32-33 (Apr. 2000). *Available here*: https://www.ftc.gov/reports/survey-rent-own-customers.

[2] Prepared Statement of the Fed. Trade Comm. on Rent-to-Own Transactions, House Fin. Servs. Committee: Fin. Institutions & Consumer Credit Subcomm. at 9 (July 26, 2011). *Available here:* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-rent-own-transactions/110726renttoowntestimony.pdf.

retailers, sometimes for substandard or obsolete products.[3] Others make payments for months, paying more than the sticker price of the product, and have it repossessed for a missed payment. In effect, rent-to-own transactions are disguised credit sales with astronomical interest rates—with one survey finding an effective annual percentage rate on a television at 370%.[4] Along with evading rules for consumer credit contracts, rent-to-own entities frequently resort to coercive collection tactics, including threatened and actual criminal prosecution, to pressure economically distressed consumers to make their payments.[5] The industry is defined by pervasive abuses in which rent-to-own firms manipulate the law to exploit and harass their vulnerable customer base.

Unfortunately, the Federal Trade Commission's proposed settlement with three leading rent-to-own operators does nothing to address the lawlessness of rent-to-own corporations. On February 21, the FTC proposed a settlement with rent-to-own operators Aaron's Inc., Buddy Newco, LLC, and Rent-A-Center, Inc. that failed to hold them to account for their market allocation scheme. Under this collusive arrangement, for example, Aaron's would close a store competing with a Buddy's location, transfer its customers to Buddy's, and agree not to compete against Buddy's in that area for three years. Buddy's would return the favor and close a store for the benefit of an Aaron's location in another area. Instead of applying the long-standing per se rule to these horizontal noncompete agreements, the FTC appears to have relied on some form of the rule of reason. The FTC's decision threatens to encourage other business rivals to collude and

[3] Bruce Speight & Greg Hart, WISPIRG Foundation, *Rent-to-Own Ripoff: Why Wisconsin Shouldn't Exempt the Predatory Rent-to-Own Industry from Consumer Protection Laws* at 5-6 (2013). *Available here:* https://wispirg.org/sites/pirg/files/reports/The%20Rent-to-Own%20Ripoff.pdf.
[4] *Id.* at 7.
[5] *See generally* Brian Highsmith & Margot Saunders, Nat'l Consumer Law Ctr., *The Rent-to-Own Racket: Using Criminal Courts to Coerce Payments from Vulnerable Families* (2019). *Available here:* https://www.nclc.org/images/pdf/criminal-justice/report-rent-to-own-racket.pdf.

profit at the expense of consumers, workers, and suppliers. The FTC also failed to challenge the interlocking directorate arrangement between Aaron's and Buddy's, under which Brian Kahn, the managing partner at the private equity firm that controlled Buddy's, also sat on the board of Aaron's.

On top of opting not to enforce existing law, the FTC's proposed settlement is toothless. It imposes no penalties for the per se illegal market allocation among Aaron's, Buddy's, and Rent-A-Center. The FTC has proposed to settle the matter on the condition that the companies not violate the law (again). The settlement also does not require admissions of fault from the misconduct or notice to the affected consumers and workers. While not enough, providing notice to injured parties would be valuable. Based on this information, they could seek counsel and pursue private antitrust lawsuits, including class actions, against the three rent-to-own operators.

This settlement marks a continual pattern by the FTC in recent years of investigating and uncovering plainly illegal conduct and failing to hold the offenders accountable.[6] Requiring companies not to break the law (an obligation that all firms already have) does not deter future lawbreaking. Settlements like this one are practically an invitation to future, profitable violations of antitrust law, including the per se ban on market allocation and interlocking directorates between competitors. Given the rent-to-own industry's business model of predation and skirting

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[6] For example, the FTC failed to impose penalties or require admission of fault on therapist staffing agencies after uncovering a per se illegal wage-fixing agreement. Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Prohibiting Conduct by Therapist Staffing Company and Two Owners Accused of Colluding with Competitors on Compensation* (Oct. 31, 2019). *Available here*: https://www.ftc.gov/news-events/press-releases/2019/10/ftc-approves-final-order-prohibiting-conduct-therapist-staffing. *See* Lucas Manfield, *FTC Approves Toothless Settlement with DFW Staffing Agencies over Wage Fixing Allegations*, Dallas Observer, Nov. 12, 2019. *Available here*: https://www.dallasobserver.com/news/ftc-approves-toothless-settlement-with-dfw-staffing-agencies-over-wage-fixing-allegations-11800222 ("The Federal Trade Commission investigated, and confirmed that Jindal and Yarbray had indeed broken the law. But, in a move that seemed to rile everyone, from legal scholars and unions to one of the agency's own commissioners, the agency declined to levy any punishment.").

the law, the FTC's refusal to enforce the law here is especially indefensible. The proposed settlement signals to the rent-to-own industry—and businesses in general—that violating antitrust rules will likely not have any real consequences.

I. The FTC Weakened the Categorical Ban on Collusion Between Corporate Rivals

The collusive agreements between Aaron's, Buddy's, and Rent-A-Center allocate geographic market share among rent-to-own store competitors. The named defendants shut competing stores and swapped rental contracts in one market for the rental contracts in another. These swaps featured a noncompete clause prohibiting the exiting firm from re-entering for three years and so served to divide up territory and customers among the firms.

Antitrust law has long deemed allocations of geographic markets by rival corporations to be per se illegal.[7] The per se restrictions on horizontal market divisions give force and effect to the principle that collusive agreement among business rivals not to compete is generally harmful to the public.[8] The Supreme Court held that territorial limitations "are unlawful under §1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness."[9]

[7] *See* United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972) ("One of the classic examples of a per se violation of [§1 of the Sherman Act] is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."); United States v. Timken Roller Bearing Co., 341 U.S. 593, 598 (1951) ("The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."); Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50 (1990) (holding that agreements not to compete are illegal regardless of whether parties split a market within which both do business or whether they merely reserve one market for one and another for the other).
[8] *See* Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.").
[9] United States v. Sealy, Inc., 388 U.S. 350, 357-58 (1967).

The other principal legal standard in antitrust is the costly, time-consuming rule of reason. In contrast to the categorical ban of the per se rules, the rule of reason typically requires enforcers to show market harms from the challenged restraints and permits corporate defendants to present business justifications for their practices.[10] Rule of reason analyses are costly and drain limited agency and judicial resources.[11] Per se rules reduce enforcement expenditures on the types of conduct whose harmful effects are least in doubt.

By placing extraordinary burdens on the government and other antitrust enforcers, the rule of reason amounts to a standard of de facto legality. The overwhelming majority of rule of reason cases ends in a victory for corporate defendants. For instance, a comprehensive analysis of rule of reason cases that produced a final judgment between 2000 and 2009 found that more than 99% (221 out of 222) ended in a win for accused antitrust violators.[12] Quite justifiably, now-retired Judge Posner characterized the rule of reason "as no more than a euphemism for nonliability."[13]

The majority also mistakenly suggested that if the facts do not necessarily prove a per se violation, the rule of reason must apply.[14] If the swap agreements as written between defendants did not explicitly divide territory and customers along geographic lines, the FTC's investigation should search for evidence of actual agreement beyond the scope of the written contract.[15] As the

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[10] United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001) (per curiam).
[11] For a detailed analysis of the deficiencies of the rule of reason, *see* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375 (2009).
[12] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason. L. Rev. 827, 829-30 (2009).
[13] Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 149 (1977).
[14] Statement of Chairman Joseph J. Simons and Commissioner Noah Joshua Phillips, Concerning the Matter of Rent-to-Own Swaps, FTC File No. 191-0074 at 4 (Feb. 21, 2020). *Available here:* https://www.ftc.gov/system/files/documents/public_statements/1567231/simons_phillips_rto_statement_22120.pdf.
[15] *Id.*

dissent notes, the investigation by the Commission did not obtain the facts necessary to determine the applicability of a per se standard.[16]

A thorough factual investigation is critical in all cases. Sophisticated corporations with outside counsel are likely to conceal per se antitrust violations in otherwise benign business arrangements. Corporations seeking to eliminate competition with each other, in general, will not declare their intentions in plain sight for the FTC and other antitrust enforcers to see. In a 2014 decision involving a comparable asset swap arrangement between rivals, the Eighth Circuit made this point:

> Perhaps there are aspiring monopolists foolish enough to reduce their entire anticompetitive agreement to writing, which would make the answer easy. But most would-be monopolists probably can be expected to display a bit more guile, jotting down only a few seemingly common terms while sealing their true anticompetitive agreement with a knowing nod and wink.[17]

The FTC appears not to have appreciated this basic insight in investigating and settling this matter.

The FTC's proposed settlement weakens the force of the per se rule against collusion among business rivals. It suggests that corporations may have an opening to introduce justifications for market allocation and other schemes to suppress horizontal business rivalry.

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[16] Dissenting Statement of Commissioner Rohit Chopra, In the Matter of Rent-to-Own Market Allocation Scheme, FTC File No. 191-0074 at 3 (Feb 21, 2020). *Available here:* https://www.ftc.gov/system/files/documents/public_statements/1567201/dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_rent_own_store_swaps_1910074.pdf. The investigation also did not ascertain the scope of harm to customer contract performance, changes in payment structure for consumers, company misrepresentations to employees, and misinformation provided to customers.

[17] In re Wholesale Grocery Prods. Antitrust Litig., 752 F.3d 728, 734 (8th Cir. 2014).

Can pharmaceutical corporations fixing the price of a lifesaving medication justify their collusion? Will employers party to a wage-fixing conspiracy have the right to rationalize their conduct? In casting doubt on the per se ban on market allocation, the FTC's proposed settlement threatens to encourage corporate collusion across the economy.

II. The FTC Subverted the Antitrust Ban on Interlocking Directorates Between Competitors

The FTC should have pled an illegal interlocking directorate arrangement in its complaint. Brian Kahn, the managing partner of the private equity firm that owns Buddy's, previously served on the board of directors of Aaron's.[18] The statement by Chairman Simons and Commissioner Phillips justifies the omission of this count because Kahn had stepped down from his position at Aaron's four years earlier.

First, challenging this horizontal interlocking directorship would affirm the per se antitrust ban on these arrangements and put corporate America on notice that the FTC will not tolerate these arrangements. Congress enacted Section 8 of the Clayton Act to address the epidemic of interlocking directorships among competing corporations in the early 20th century.[19] In an influential decision interpreting Section 8, one district court wrote:

> [T]he broad purposes of Congress are unmistakably clear. Section 8 was but one of a series of measures which finally emerged as the Clayton Act, all intended to strengthen

[18] An illegal interlock is not limited to one person sitting on the boards of two or more competitors. An individual or entity represented by different individuals on the boards of competing firms can run afoul of the ban on horizontal interlocks. *See* Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F.Supp.2d 301, 331 (S.D.N.Y. 2003) ("To establish their claim, plaintiffs will have to show not merely that Kaplan and Karsh both work for Oaktree, but that their service on the boards is not in their individual capacities, but as the deputies of Oaktree, acting as the puppets or instrumentalities of the corporation's will, such that it can legitimately be said that it is Oaktree as an entity, and not Kaplan and Karsh as separate persons, which "serve[s] as a director" of both Loews and Regal.").
[19] H.R. Rep. No. 627, 63d Cong., 2d Sess. 41 (1914).

> the Sherman Act, which, through the years, had not proved entirely effective. Congress had been aroused by the concentration of control by a few individuals or groups over many gigantic corporations which in the normal course of events should have been in active and unrestrained competition.[20]

In the late 19th and early 20th centuries, investment bankers such as JP Morgan wielded extraordinary control by sitting on the boards of numerous corporations and shaping business decisions from these perches.[21] In the case of interlocks among rival corporations, these arrangements functioned as soft mergers, allowing competitors to coordinate their pricing and other decisions and limit head-to-head competition.[22]

Second, the FTC should use this case as a vehicle to clarify the scope of the ban in Section 8. The text of the statute refers to "corporations" and carves out "banks, banking associations, and trust companies."[23] Congress enacted this law decades before the rise of limited liability corporations (LLCs). While no reported court decision has addressed whether LLCs are covered under Section 8, they should be for at least three reasons. First, Congress, in enacting Section 8, aimed to strike broadly and go beyond the reaches of the Sherman Act.[24] In light of this legislative purpose, the FTC should resolve any ambiguity in support of an expansive

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[20] United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953).
[21] Victor H. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years,* 59 Yale L.J. 1266 (1950).
[22] *Id.* at 1267.
[23] 15 U.S.C. § 19.
[24] *See* TRW, Inc. v. FTC, 657 F.2d 942, 948 (9th Cir. 1981) ("Section 8 was designed to prevent restraints on competition before they materialized by outlawing a particular practice thought to facilitate such restraints. Congress undoubtedly was as concerned with restraints that stop the growth of competition at a low level as it was with restraints affecting substantial segments of commerce."); Sears, 111 F.Supp. at 616 ("[A] fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. [internal citations omitted] The legislation was essentially preventative.").

reading and interpret Section 8 to cover LLCs. Second, LLCs functionally resemble traditional corporations. They both possess state-granted limited liability, separate legal personhood, and potential immortality.[25] Third, excluding LLCs would create a large coverage gap in Section 8. LLCs have become the preferred business form: In a typical year, LLC filings outnumber incorporation filings by a factor of three or four to one.[26] A Section 8 confined to traditional corporations would not prohibit horizontal interlocks among the most common form of new business enterprise.

At a minimum, the FTC should have alleged that this interlocking directorship violated Section 5 of the FTC Act. If the FTC insists on reading Section 8 narrowly and holding that LLCs fall outside its scope, it should use Section 5 of the FTC Act to challenge the interlock. An important function of Section 5 is to fill gaps in the Clayton and Sherman Acts.[27] The Supreme Court has repeatedly stated and held that the FTC Act goes beyond the scope of the other antitrust laws. Specifically, the FTC can identify and prohibit practices "beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[28] As the Supreme Court wrote in a 1986 decision interpreting the FTC Act, "The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against

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[25] Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 Del. J. Corp. L. 391, 415-17 (2018).
[26] Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 Fordham J. Corp. & Fin. L. 459, 468-78 (2009).
[27] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust L.J. 929, 935 (2010).
[28] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

public policy for other reasons[.]"[29] Using Section 5 in this fashion against a horizontal interlock would be a pragmatic and indeed modest exercise of the FTC's broader antitrust authority.

III. Instead of Holding the Three Rent-to-Own Operators to Account, the FTC Merely Told Them to Go Forth and Sin No More

In addition to its flawed and incomplete antitrust allegations, the FTC settlement fails to deter future antitrust violations. The FTC did not require the three entities to return ill-gotten gains from their collusion. It also did not require an admission of fault nor notice to affected consumers and employees. The proposed settlement merely compels no further lawbreaking, a duty that already applies to the three firms and indeed all market participants subject to the antitrust laws.

By not obtaining any monetary remedies, the FTC further undermines deterrence of antitrust violations. Deterrence of cartels and other horizontal collusion is already inadequate. The present combination of public sanctions, including criminal fines and prison sentences for conspirators, and private damages is not enough. Even factoring in penal and civil consequences, cartel activity still pays.[30] The FTC's proposed settlement, by not requiring any monetary remedies, only further undermines antitrust deterrence of corporate collusion.

The FTC also failed to help injured consumers and employees bring their own antitrust suits. The FTC did not require the rent-to-own operators to provide notice to all the injured parties. In the absence of notice, they may never learn that they were victimized by a market

[29] *See* FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 454 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons[.]").
[30] John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427 (2012).

allocation conspiracy and robbed of their money, either as consumers of goods overpaying for household goods or employees underpaid on the job. The FTC also did not insist on an admission of fault from the three firms. Through this admission, injured parties, who seek to vindicate their rights through litigation, would not have to prove liability in court and would have an easier path to being made whole. The FTC should support private enforcement here and in general. Consumer, competitor, and worker lawsuits are a pillar of the U.S. antitrust enforcement regime and, according to one influential study, provide more deterrence of antitrust lawbreaking than does criminal enforcement by the Department of Justice.[31]

IV. Conclusion

The FTC has once again failed to hold antitrust violators to account. It chose not to apply the long-standing prohibition on horizontal market allocation and seems to have given the three corporations an opportunity to justify their conduct. This decision casts doubt on the FTC's commitment to enforcing the per se ban on corporate collusion and suggests a legal opening for corporations seeking to fix prices or divide markets with rivals. This choice threatens to encourage corporate cartels against consumers, workers, and suppliers. The FTC also did not challenge the interlocking directorate between Aaron's and Buddy's and put all competing corporations on notice that interlocks are still prohibited. Topping off this erroneous and incomplete legal analysis, the FTC let the companies off with a warning not to break the law again—an existing duty for the three and all businesses.

[31] Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 26 (2013).

The failure in this case is notably egregious. The rent-to-own industry has long evaded the letter and spirit of federal and state consumer protection law. Indeed, the basic business model is built on mischaracterizing rent-to-own as enabling rentals of appliance, electronics, and furniture instead of purchases on credit. It also relies on aggressive collections practices. The industry is notorious for using criminal law and threats of prosecution to coerce consumers in distress to make their payments. The FTC had an opportunity to bring a degree of accountability to this lawless industry and has proposed not to take even modest steps in this direction. We urge the FTC to recognize its grave error and revisit this ineffective and potentially dangerous proposed settlement.