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ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

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Intro: Welcome to Porter Wright's Antitrust Law Source.

Jay: This is Jay Levine, your host of Antitrust Law Source podcast. And I'm thrilled to be joined by my partner Brett Thornton, how you doing, Brett?

Brett: Good. Happy to be here.

Jay: Great. Brett is the chair of our startup and emerging business practice as well as the chair of our energy group. And we're actually going to be talking about the former today in terms of deal work, and especially how things may have been affected this year and sort of going forward. But let me start out by just saying everybody is well.

Brett: Yeah, absolutely. It's still been a very busy year, into the first quarter, when things really slowed down, when COVID started, things really picked up. And it's been a very robust, busy year in the M&A space for us. And then, I can only speak for us, but I think very generally, as well, from what I've heard, we've been busy.

Jay: Let's get right to it, then. You're in Columbus. And that's a pretty good hub of startup in emerging business activity. Everybody was sort of shocked at what was going on with that pandemic, and not much was going on. You said it's been busy. Have you noticed any differences in the deal work in terms of the types of deals that are going forward, or the types of investments or the types of exits.

Brett: You know, we haven't seen a difference in the type of work and Columbus does have a great emerging business ecosystem. And we have a lot of universities and institutions, large hospital systems, engineering and consulting, firms, military installations that throw off a lot of tech commercialization projects. And so because of where we are, and because of the type of projects that tend to locate here, with entities and persons developing intellectual property, we tend to see a lot of tech oriented things. And we see tech both generally and because there's a lot of healthcare, insurance, healthcare space type of things. We tend to see a lot of healthcare, biotech sort of projects. And we've seen and continue to generally see that type of work. So the type of work hasn't changed substantially, we've seen some growing focus on pandemic healthcare related type projects, but more still really in the discussion phase, and then the rollout, organization or organizational proof of project. I would say proof of concept, a lot of this concept is pretty clear, it's proof of commercial viability stage won't seem to change in the type of project. We've seen a change in the rhythm in this area of work. It was disrupted substantially back in March and in April, and I think a lot of projects went on hiatus. Maybe this is the right way to put it or took a pause? Yeah, took a pause while everyone was determining what was going to happen with COVID. And what consequences it would have for the capital markets in the in the ability to access capital, both from private individuals and from state and other government type sources to fund these projects. And what we saw is that pause ended pretty quickly, because I think it became clear that this type of work was still going to go forward. The other places may have seen a pivot to different types of projects. We didn't we saw our type of project come back. And I think what we've noticed is maybe less volume and a little bit longer lead times on getting things done than we saw before all the pandemic related stuff came up.

Jay: That makes sense. We're just maybe not quite as efficient as we were before. I mean, you mentioned, I'm curious about one thing. So in terms of access to capital, obviously started some emerging businesses, one of the things they need is cash they to fund the projects to go forward. Let me ask you from the two sectors, the private sector, and then the government sector, is there cash to be had for these types of businesses in the private sector? And is there cash to be had investments to be had from the from the government side?

Brett: Yeah, I think there's a lot of cash to be had on both sides. The government side, I we have yet to see a change in the funding proposals. The government state-assisted large state affiliated institution-assisted buckets of capital appear to still be available, and we expect them to, if maybe not grow, remain available, even where there are cuts in other areas of government spending. And so currently, it might get wound back a little bit, I don't think it's going to go away. And so that'll still be there, it might be constrained, I don't think we know for sure we haven't heard a lot about it, it's not going to go away. It might, it probably won't grow. But I think the state funding will still be there. Because this is important stuff for state economic growth and employment initiatives. It may not be across the country, that they have the same type of focus on the US. But in Ohio, and in Columbus, this has been a substantial focus for growth -- tech development, commercialization and growing jobs around these types of efforts associated on the state side, largest detections are still pretty flush, a lot of the work that we do is associated with funds that are established by large insurance companies, by a large hospital systems by other types of entities that have a specific focus on different types of technology that are complimentary to or beneficial in their segment of the corporate landscape.

And so those companies all seem to be doing fine, I think you're still going to see those pools of capital available. So you know, if I look at it, there's really three that I think of, and that's state funding the large institutional, large corporate focused funding, and then there's the private capital. And I don't see any diminishment in the enthusiasm for private capital with respect to these types of financing efforts, because I think there's a lot of money that people are paid to manage, or that wealthy individuals to families have that needs to get deployed. And there's not an enthusiasm for dumping it on the index stocks, particularly, even though the markets done well that there's always an effort to try to diversify portfolios. And so we still see a lot of private money flowing even into emerging stage business deals. And when I say that it's emerging stage, we don't have a true startup practice where you know, companies come to us off the street, and I have an idea where you guys represent me, we tend to be referred in and be connected with entrepreneurs and companies, when they're already fairly far down the road, to the point where they have established the commercial viability, they're talking to financing sources, and a lot of times it's a financing sources, even when we end up representing the company that say, hey, you need to go and get competent counsel that knows how to do this type of deal in advance of us being able to fund you. So I think, you know, there's still enthusiasm for investing in that type of company. It's vetted, it's got some other incubator accelerator, Think Tank enthusiasm and opportunities already, when private individuals and private money can come in and be part of the capital stack for that kind of deal. I still think that's still we see that in every deal still.

Jay: Interesting. Yeah. From what I've heard from just friends and business acquaintances, and the like, I mean, private equity and venture capital, they're still closing, they're still opening and getting funds, you know, fully stocked, and still looking for the deal. So, it does look like there is cash out there to access either via the phone or via sort of the private, family type, foundation institutions. Now, you had said that you normally see tech, biotech healthcare related stuff, and, and that now the concepts may be a little bit more pandemic related have? Have you seen any sort of emerge into sort of the getting out of the batter's box? I'm curious as to I mean, it's a guess as to how long the pandemic will last and how long your solution is going to be required?

Brett: Yeah, I think there is a risk associated with doing anything that's specifically related to the pandemic, when we have no idea how long this is going to continue. And I'd say that without taking a position in or speculating, is a better way to put it with respect to what that looks like, because I don't think anybody knows. And so I actually haven't seen anything get out of the batter's box. And I'm, and we are, we're one firm in the region that works on these projects. And, you know, if you have someone else on from another firm, that may be all they're doing, and they might have several projects already in, in the funding stages. We don't. I've heard about a bunch of interesting stuff, that sort of stuff that you would expect to hear for the next generation technology on PPE or ventilators or, or even in drug development efforts or drug refinement efforts. And we hear about them, they say, that's interesting, obviously. When anybody brings any of these to us, of course, we'd be happy to help let us know what we can do. But haven't had anyone actually come back because they're lined up and in the financing queue. Honestly, it has not happened, but that doesn't mean it won't, but more, more chatter, more noise and not a lot of actual substantive projects coming out of those discussions.

Jay: Okay. I want to turn now to a slightly different question. Obviously, we're coming up to the elections. And it there's always I guess, in the M&A world, the adage that your firms want to close their deals by December 31, prior to a new one inauguration, just because of uncertainty and the like. Do you expect to see deal work pick up even more in the in the coming months in anticipation of that? Or do you think somehow this year is going to be different?

Brett: I think it will pick up and without making any statement as to because I'm not a tax guy. And I follow along, and we have great tax lawyers here, I think there may be some impetus to get things done before the end of the year. We have a lot of deals going on right now, as I said, very active. I think that everyone, you know, with whom we're working on a deal, right now wants to get it closed by the end of the year. So there's already a backlog. And I do expect to see the real late rush. I mean, in any year, you know, you get the calls on December 15, with the extremely large, complicated deal that has to get done by the end of year. Right. And we always say, Well, of course, we'll do everything we can to accommodate your timing, right? Whether or not they were to hold my feet to the fire and say, is there any way it's in any conceivable way? It's possible? You know what my answer might be? But I do think we'll see that come. I just don't think it's here yet. I think we're a couple weeks out from that.

And we'll see what happens there might be, and the reason I think we're a couple weeks out from it is there might be people that are looking to see what happens with the election. And when that's decided there, that might be the motivator to say, Okay, well, we've wanted to do this, and now we've got to get it done. So I hope that's the case that people come and talk to me the Wednesday after the election, and not December 15. That certainly would give us a better chance of getting it done. And making everyone's life a little less stressful at the end of the year. But we'll of course handle whatever timeline that our are clients needs.

Jay: We're open 24 seven, but for yours for your sanity, I do hope they come a little earlier. I'm curious, you know, obviously, you're in Columbus, I'm in DC, and we all hear about whether there's going to be another COVID release package or not, does that at all affect the deal work or the flow? Or is that really just more at the, you know, personal family level?

Brett: Yeah, I don't see that as having a consequence for deal work that I do, I don't expect to be the reason that anyone does or doesn't move forward. Now, maybe it'll have the consequences of saving some companies that might otherwise go under, and then there'll be more companies available. And then the potential transaction space, and so that could have some down the road future potential consequences. But I there's so much uncertainty around that, too. I'm an M&A lawyer, and I keep my ears open and try to learn as much as I can about the broader markets and sort of the macro things that that drive them, but I'm more of a technician. And so when the deals come, we'll get them done. And what exactly drives the markets that creates the opportunities for me, I have some sense of it. But I'll find you a better guest if you want to.

Jay: You're far too modest. No, that that that makes sense. So we've sort of chatted about this a little bit in the in the past the House Subcommittee on Antitrust recently laid a report, after doing an investigation into market concentration and the like, and they have a number of proposals of sort of changing the antitrust laws and I want to run a couple of them by you to get your perspective as a deal lawyer. Now, I assume a lot of these especially emerging companies and the like, a lot of the exit strategy is to be bought by either upfront or by one of the bigger sharks, whales, whichever term you want to use in the industry, who want to buy them out because they find that their businesses is a good compliment, or, frankly, is even a potential rival to them. Right. that's what motivates a lot of the startups in emerging companies.

Brett: Yeah. And we still see certainly that that's something that entrepreneurs that's starting a company like this, particularly as a commercialization effort out of an institution or with any type of technology, depending on what it is, you know, they're, they're doing it and most of the time, they're not doing it with the expectation that they're going to grow and 10 years from now have fortune 500 company of their own, there's an exit strategy. That's usually a five year type of exit strategy. That contemplates having several outlets, private equity, but certainly strategic buyers. And that can include and often does, with the companies that we see large major corporate strategic buyers that want to buy it and roll it into operations, because it's ancillary. You know what you're getting too potentially competitive. It could be an enhancement, I obviously don't want to see too much additional regulation that would frustrate that for very self-interested reasons. But, also, I think that you could have consequences associated with imposing regulation that frustrates those types of transactions that would have exactly the opposite effect of what the persons drafting the regulation intend to do.

I mean, first, it could make it too hard to find an exit to my point, you aren't a lot of times finding people that have the ability to run and grow these things into their own self-sustaining large entities. And so if you can't do that, and that's going to make persons less interested, you might have a bunch of tech sitting within these large institutions, these are tech systems etc, that they would otherwise be able to find a serial entrepreneur to take out into the market with the expectation of a fairly reasonable timeframe in which they can expect to have a monetary reward for their efforts. And they're not going to do it. And so you're going to have less innovation. And then what replaces that? Well, I mean, one of the things that comes to mind is maybe what replaces that is, it seems to me that a lot of these major strategic buyers have looked at these entrepreneurs, the private, emerging business, venture capital, financing for these and sort of just outsourced innovation, right. And so they've just let people grow and run these not pick winners, internally seen what worked and then snatched up the good ones. What you might see then is if that the regulation frustrates that process, then you might see a reinvigoration of internal R&D and growth within these large organizations, and then you're going to end up in the same place with less opportunity to create competitors in the market.

Jay: Let me let me be a little bit more specific, one of the proposals actually was first, that if you have a 30% market share, you actually have to, instead of the government having to prove that the acquisition would be problematic, you would actually have to affirmatively justify the acquisition, and prove that it won't be problematic. And, so that's a 30% market share is not dominance, but it's not nothing. But then also, if you achieve that, then you're going to go through a lot of, expense time, effort and money to try to convince the antitrust regulators have essentially a negative, that acquiring this new nascent company is not going to thwart what would otherwise have been potential or actual competition. Now, if those kinds of frameworks are adopted by the next administration, Republican or Democratic, it would seem to me that that would very much sort of reorient a lot of, you know, private investors and, and reorient the incentives for all of these entrepreneurs.

Brett: Yeah, well, absolutely. You're not going to have, even when you have investors come into companies like this private equity and larger venture capital, what they're putting money into is the hope that again, that there will then be further financing events and exits. And so what you just described, because it sounds good on its face, but you and I, as lawyers, you particularly know that if you put something in place that says that if you have 30% market share, then you have to prove that it becomes a scenario not where the government has to prove it's problematic, or you have to prove it's not. So that's just going to further narrow the field of potential acquires for any company like this, because I think the flaw is assuming that the only acquire is out in the space or Google and Amazon. No, I mean, there's all sorts of other companies at different tiers and with different levels of resources that are also out in this space and looking to acquire emerging businesses. If you make this so hard and what you just described there, Jay, all that's going to do is elongate the process of effecting an acquisition and make it much more expensive from a legal standpoint and create The specter of potential penalties and liabilities that certain companies are just fine with and have all the resources in the world to deal with. And other companies are now going to look at and say, we don't know if we can continue to participate here anymore.

Jay: It seems to me, it would also, perhaps damping, sort of, you know, acting lawyers abinitio, at the very beginning, the types of ideas that get, put into place, because you have to think about five to 10 years down the road, who am I selling to? Who am I going to have a problem with? And that may very affect the type of technology I want to develop?

Brett: Right and do you want a robust market? I mean, if you make it hard, if the consequence of this is there are less exits, and there's less deals, and there's going to be less money going into these deals, and there's gonna be less companies getting funding, there's gonna be less innovation. And I don't think we're going to end up where the person's drafting the legislation unless they're very careful want us to end?

Jay: Right. Well, I mean, that's true for everything. But I mean, it does sound like there's a lot of unintended consequences to anything like this. But it is certainly on the on the horizon, it's up for discussion, no matter who gains the White House, come next week, as well, as you know, changes just even to the Heart-Scott rules of where one now has to file more for minority investments. There used to be used to be easier and more exemptions to the Heart-Scott rules of minority investments, now there are fewer. And I think there is an outlook by the regulators that they want to have the ability to look at these deals with more scrutiny, and possibly block a lot of these deals, even minority investors. And I assume that's again, something that could you know, affect deal work, from your perspective.

Brett: Anything that makes deals less attractive, because it's going to be harder to exit and create cash events for investors is going to, it's not going to make deal work harder necessarily for me. For you on the antitrust side for you, Jay, absolutely. There's gonna be more complexity, more risk and more to deal with. For me, unfortunately, it'll probably just, you know, create a scenario when there's fewer deals, which right now, it's harder to, it'll be harder to find deals. So the harder to stay busy, the deals won't be harder. It'll just be unfortunately, a less robust market, which I certainly don't want to see that. But you know, that's obviously, from where I'm sitting, that's the answer anyone would expect me to give. And I obviously understand that there's different sides of this. But you know, we like to see and our part of this discussion, you know, finely tuned and focused regulation, that is formulated, and intentionally in a way where it's meant to cause as little disruption as possible to an open and free market.

Jay: And listen, open and free deal markets, one would hope, translate to an open and free operating markets as well. So I think we're saying the same thing here. And I guess we'll have to see, but this has been an interesting discussion, and maybe post selection. We'll see what happens and see how well we did in terms of figuring out what the potential effects are. But for now, I think we've pretty much run out of time. I hope you and your family continue to stay well, and that you continue to be busy and that there aren't too many December 15 calls and that you get to enjoy the holidays in a somewhat restful fashion.

Brett: Oh, that's fine. I have a deal attorney I'm the please still call me on December.

Jay: Yes, well this is Jay Levine, you can reach me at jlevine@porterwright.com. I'm on Twitter and Linkedin. And Brett how can folks reach you?

Brett: It's bthornton@porterwright.com as well.

Jay: Okay, well, I everybody out there stay safe, stay healthy. And stay tuned for our next podcast.