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Public Statements Used to Prove Price Signaling

Section 1 of the Sherman Act prohibits any contract, combination or conspiracy that unreasonably restrains trade or commerce. By its terms, Section 1 of the Sherman Act is limited to concerted action. Certainly, concerted action can be proven with evidence of explicit written or verbal agreements. Most of the time such smoking guns don't exist and proof of concerted action is inferred from circumstantial evidence. One such avenue of circumstantial evidence is proof of parallel behavior or price signaling. For example, proof of a conspiracy has been inferred by showing parallel pricing and competitive bidding behavior.¹ A recent case has held that public statements made by companies in earning calls and industry speeches can support a claim of parallel conduct or price signaling.

In *In re Delta/Air Tran Baggage Fee Antitrust Litigation*,² plaintiffs brought a class action alleging that Delta and AirTran had reached various agreements through public statements about their future business plans. The defendants sought dismissal for failure to state a claim which was denied by the District Court. Generally, plaintiffs alleged that defendants colluded through a series of earnings calls with industry analysts and speeches/break-out sessions at industry conferences so that both airlines imposed a first-bag fee. Plaintiffs even referenced a response by Delta to an analyst question as opposed to an affirmative statement to show price signaling or concerted conduct. Many of the statements regarding future business plans stated the importance of competitor action. For example, Delta stated on one earning call that it could not cut capacity alone and was hopeful that other "carriers act responsibly."

While noting the weaknesses in plaintiffs' case, the Court determined that dismissal was improper because plaintiffs' complaint contained sufficient factual specificity to establish an unlawful conspiracy.

The case is important or instructive because it shows the care that companies should use in publicly disclosing future business plans, especially if those plans are contingent upon competitor's actions. Such public statements carry the risk of being construed as price signaling. Extra care should be taken during these tough economic times as companies make public statements to convince investors and analysts that the company will remain profitable.

Endnotes

- 1 *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).
- 2 N.D. Ga. Aug. 2, 2010.

About the Authors

Bradley C. Weber is a partner at Locke Lord and is the co-leader of the firm's Antitrust Litigation Practice Group, working in both the Dallas office and the Washington, D.C. office. He is experienced in a wide variety of arbitration matters and commercial litigation in both state and federal courts. His practice includes the representation of clients in cases involving antitrust, energy, oil and gas, construction, technology and banking law.

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