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PUBLIC STATEMENTS AS EVIDENCE OF AN ANTITRUST CONSPIRACY

Public statements by corporate executives may help plaintiffs plead antitrust conspiracy claims. In *In re Delta/AirTran Baggage Fee Antitrust Litigation*, [1] the Court held that a price-fixing complaint stated sufficient facts to survive dismissal because in addition to claims of parallel conduct, the complaint also detailed public statements by corporate executives that allegedly facilitated the illegal conspiracy.

In *Twombly*, the Supreme Court made clear that parallel conduct without more does not run afoul of the antitrust laws. Since parallel conduct is as consistent with unilateral self-interest as it is with conspiracy, a plaintiff must allege additional facts to render an allegation of conspiracy plausible. As the *Delta/AirTran* decision demonstrates, these additional facts may be public statements.

The *Delta/AirTran Baggage* ruling underscores the potential antitrust risk accompanying public statements – particularly those relating to pricing, capacity, or future strategies and marketing plans. Perhaps the most troubling aspect of this opinion is that many of the statements considered by the court were responses to analysts' questions. While the court did indicate the fact that the statements were elicited by analysts may diminish the statements' probative value, it did not disregard the statements.

Public statements, while perfectly legal and often necessary, have become an avenue for plaintiffs to allege sufficient circumstantial evidence to state a Section 1 conspiracy claim – or at least survive a motion to dismiss. Companies, therefore, should exercise caution before making certain kinds of statements. Some examples of statements or situations that may increase antitrust risks are:

Announcements of Future Prices or Strategies: Future pricing announcements are the most often cited example of unilateral company conduct that may be interpreted as evidence of an illegal agreement. A plaintiff may allege that a company's pricing announcement – or "price signaling" – is a covert "invitation" for competitors to follow the company's lead. The risk is not, however, limited to statements regarding prices. Statements regarding future sales terms, strategies, or marketing and production plans, pose similar risks. In short, statements regarding any future conduct that if agreed to among competitors, could have the effect of increasing price or limiting capacity in a market may provide fodder for an antitrust lawsuit.

Statements at Industry Conferences and Trade Meetings: Industry conferences and trade meetings offer company officials important opportunities to meet and share information and observations about their business and the marketplace. While these exchanges are by and large legitimate, plaintiffs may cite statements made at such events as invitations to conspire to restrain trade.

Statements on Earnings Calls: The plaintiffs in the *Delta/AirTran* litigation identified statements made on quarterly earnings calls as circumstantial evidence of a conspiratorial agreement. The Court, in denying the companies' motions to dismiss, explained that it is "undisputed that the two companies monitor each other's earnings calls" and "therefore reasonable to infer . . .

[1] No. 1:09-md-2089 TCB, 2010 WL 3290433 (N.D. Ga. Aug. 2, 2010).

that Delta's statements concerning the 'industry' were directed to AirTran."[2]

Press Releases: Company press releases, like other announcements, offer a potential mechanism for a company to invite competitors to collude (or accept previous "invitations"). Because companies are known to monitor their competitors' releases, plaintiffs may cite such releases as a means of communicating between competitors.

Given the costs associated with defending even a frivolous antitrust law suit, the following actions are suggested as a means to mitigate antitrust risk around public statements:

1. Public statements, speeches, and press releases should be vetted with the Legal Department prior to dissemination. It may be wise to limit who within a company may engage in such activity to better facilitate the implementation of this safeguard.

2. Public statements should only be made where there is a legitimate business need for the statement.

3. Company personnel speaking at or attending public functions, particularly functions where competitors may be in attendance, should be provided clear "do-and-don't" guidelines.

Again, while there is nothing per se illegal about making public statements, or reacting to the public statements or actions of a competitor, a little prevention could well save a pound of cure (or legal fees).

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[2] *Id.* at *9.