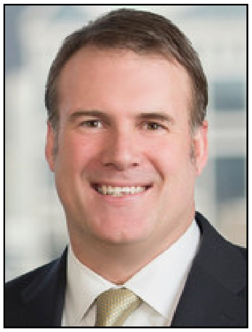
Bag Fee Case Highlights Antitrust Risk Of Public Statements



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Law360, New York (April 11, 2017, 4:12 PM EDT) -- For publicly traded companies, earnings calls are routine business events, as are press releases, speeches, investor conferences and trade association meetings. However, in the world of antitrust law, words uttered in these situations can provide fodder for plaintiffs to claim that instead of providing information for investors and the public, the communication's purpose was to invite competitors to unlawfully collude. In the past several years, allegations that competitors used public statements to carry out a price-fixing agreement have been a common thread in antitrust class actions and multidistrict litigations.

Recently, a federal district court granted summary judgment in an antitrust case based on earnings calls in the airline industry. While the defendants ultimately prevailed, the case stands as a reminder to publicly traded companies to be mindful of antitrust considerations in earnings calls and other public communications.

In re Delta/AirTran Baggage Fee Antitrust Litigation

On March 28, 2017, the U.S. District Court for the Northern District of Georgia granted summary judgment in favor of defendants Delta Air Lines Inc. and AirTran Airways Inc., rejecting the plaintiffs' claim that Delta and AirTran violated Section 1 of the Sherman Act by agreeing to fix prices for baggage fees in earnings calls and other communications. In re Delta/AirTran Baggage Fee Antitrust Litig., No. 1:09-md-02089 (N.D. Ga. March 28, 2017).

Delta and AirTran were strong competitors in Atlanta, where both airlines operated a hub. Beginning in 2006 and 2007, low-cost carriers introduced fees for services and ancillary products, including a second bag of checked luggage. By the first quarter of 2008, every legacy airline but one had also implemented fees for a second bag of checked luggage. AirTran announced a second-bag fee three weeks after Delta announced it was implementing the fee.

Soon, airlines implemented fees for a first checked bag. But by May 2008, Delta and AirTran had not. Baggage fees were a frequent topic of conversation in earnings calls, and several carriers stated they expected the fees to prove profitable. One mentioned it had not gained market share by holding out.

The plaintiffs alleged that Delta and AirTran used earnings calls from May 2008 to November 2008 to collude on implementing a first-bag fee. When questioned by an analyst on a July 2008 earnings call, Delta stated it had no plans to implement a fee but would continue to study the question. In later calls, Delta said it was considering implementing the bag fees to generate additional revenue. During this time, AirTran publicly stated it was eager to implement fees to generate revenue but was hesitant to do so considering its primary competitor in Atlanta (Delta) was not charging first-bag fees.

In its third quarter 2008 earnings call, Delta said that its impending merger with Northwest would provide it with another opportunity to consider fee-based revenue. Two weeks later, in its third quarter earnings call, AirTran announced it had the programming in place to implement the fees but had not moved forward because Delta had not implemented the fees. AirTran's prepared remarks did not mention first-bag fees; this statement came in response to an analyst question. A few days later, Delta adopted a $15 first-bag fee. The fee was consistent with that charged by Northwest, with which Delta was merging. Although its revenue management team opposed the fee, Delta decided it needed extra revenue during tough economic times to fund its employee pension plan. Five days later, AirTran announced it too would impose a $15 first-bag fee.

In an antitrust case, when assessing whether there was an unlawful price-fixing agreement, limited inferences can be drawn on summary judgment. Plaintiffs must show that some evidence tends to exclude the possibility of conscious parallelism — that is, synchronous pricing that is a "rational, independent calculus by each member of an oligopoly." To demonstrate that parallel conduct is the product of an illegal conspiracy, plaintiffs must demonstrate "plus factors" that reasonably enhance their conspiracy claim.

The Baggage Fee plaintiffs urged the court to consider AirTran's third quarter earnings call statements, which they characterized as an invitation to collude, as a plus factor. An invitation to collude is an improper communication from a firm to a competitor that the firm is ready and willing to coordinate on price, output or other competitive terms. The defendants argued that the cases discussing invitations to collude involved claims under Section 5 of the FTC Act. They reasoned that an invitation to collude cannot be viewed as a plus factor because Section 1 Sherman Act, unlike Section 5 of the FTC Act, prohibits contracts and conspiracies in restraint of trade. The court declined to resolve this legal issue. Rather, it held that even assuming an invitation to collude may constitute a plus factor in some cases, it was not a plus factor under the facts before it.

The earnings calls in Baggage Fee were not a plus factor because the statements contained the type of information companies regularly convey to shareholders for a legitimate business purpose. Baggage fees were a topic of interest to the industry, shareholders, and analysts, had been discussed on several other airlines' earnings calls in the preceding three quarters, and were widely reported in the press. And, the court could not infer an invitation to collude when the firm supposedly extending the invitation was not firmly committed to the new pricing strategy at the time it made the statement. The court also noted that the conduct at issue (Delta's and AirTran's decisions to implement first-bag fees) ultimately conformed to a strategy that numerous competitors had already adopted and had reported on the success of. Thus, the statements were as equally explained by rational, independent business strategies as they were by an illegal agreement. Therefore, under the well-established standard for summary judgment in antitrust cases, the court dismissed the case.

Jurisprudentially, Baggage Fee continues the trend of antitrust cases granting summary judgment where earnings calls were alleged to have facilitated a conspiracy. See Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003); Hall v. United Air Lines Inc., 296 F. Supp. 2d 652 (E.D.N.C. 2003), aff'd sub nom. Hall v. Am. Airlines Inc., 118 F. App'x 680 (4th Cir. 2004). An issue to watch going forward is whether courts expand the reasoning of this line of cases to the motion-to-dismiss stage.

The FTC Also Brings Enforcement Actions Concerning Invitations to Collude

The Federal Trade Commission also has addressed invitations to collude under Section 5 of the FTC Act, which can be broader in scope than the Sherman Act and is limited to prospective relief. The FTC's rationale for imposing liability on mere invitations to collude, rather than agreements, is that: (1) it is tough to determine whether an invitation has been accepted; (2) even if the invitation is unaccepted, it may facilitate coordinated interaction (and thus cause competitive harm) because the communication revealed a competitor's intentions; and (3) it deters harmful conduct that has no legitimate business purpose. Further, a competitor may view earnings call statements as more credible given a public company's obligation to not make false or misleading statements.

The FTC recognizes that companies have understandable reasons to discuss business strategy and financial results with investors and the public. While the FTC is mindful not to chill public disclosures of legitimate information, it has cautioned that when bringing an enforcement action, the misconduct need not be attributable to senior executives and the FTC is not always required to define a market, show market power, establish competitive harm, or even find the terms of the agreement were communicated with precision.

Prior enforcement actions involving public statements allege the statements had no business justification other than to invite a competitor to join an illegal conspiracy:

- In re U-Haul International Inc., FTC No. 0810157 (2010) (alleging a specific intent to collude due to public communications detailing pricing strategy, urging competitors to increase price, acknowledging a competitor's refusal to match its prices, and communicating a willingness to wait a while longer for the competitor to respond appropriately and to tolerate a small price differential);

- In re Valassis Communications Inc., FTC No. 0510008 (2006) (alleging earnings call statements describing future pricing plans and customer strategy, including precise details about implementing a price floor and how the firm would handle bids, as well as an intent to monitor competitor earnings calls for "concrete evidence" of reciprocity regarding the new pricing plan in "short order"); and

- In re Stone Container Corp., 125 F.T.C. 853 (1998) (alleging press releases and published interviews communicated a firm's intentions to lower output and draw down industry inventory levels and invite competitors to raise price industry wide).

Practical Considerations for Public Statements

Companies should be mindful of the role that public statements can play in potential antitrust claims. While the Baggage Fees defendants prevailed, they endured significant discovery, potential uncertainty and business distraction in achieving this result. And, the FTC has a lower burden on the merits, as the FTC does not have to prove an agreement, only an invitation to collude.

While the case law does not provide rules to govern every possible situation that might arise in an earnings call or other public communications, precedent on invitations to collude provides some general guidance:

- The form of the communication is not determinative. The fact that a statement was publicly made does not make it immune from antitrust scrutiny.

- It is lawful to disclose information required by federal securities laws. Prior enforcement actions included a safe harbor for the dissemination of such information.

- Consider the intent of the communication and whether there is a legitimate business purpose for making it. Is the information of the type normally disclosed to securities analysts? How often is it discussed in industry calls? Do not make public statements with the specific intent to collude or which are likely to result in an agreement to collude.

- Avoid discussions on price or output. If price or output must be discussed, avoid disclosing future information or strategy, especially in precise terms. As a guide, the more general the information, the lower the risk. Historical information is less sensitive than prospective information. Aggregated information carries less risk than product-specific or market-specific information. But, avoid discussing specific details. While courts have rejected assertions that nonspecific, forward-looking statements are improper signals to competitors, plaintiffs have still twisted such statements into allegations of a conspiracy, resulting in expensive and time-consuming litigation. In other words, exercise extreme care if price or output must be discussed.

- Use caution when responding to analyst questions. Even if an analyst asks a question, it may be inappropriate to answer. Avoid discussing price, specific customers, or detailed information about output or capacity. Keep off-the-cuff remarks brief.

- Do not suggest how a competitor or the industry should react to your company’s strategy or changing industry conditions, such as declining price, decreased demand, over-capacity, or new fees and services.

- Do not state an intention to monitor competitor earnings calls for a response to statements or business strategies. And, do not state that your company’s strategy or business decision depends on other firms following your lead or taking the lead in implementing the strategy.

- Document internal pricing deliberations and decision-making processes.

The antitrust implications of earnings call statements present interesting legal issues. On the one hand, it seems implausible that companies would conspire in public, especially where they know a written transcript of the communication will be kept; the main justification for earnings calls — Regulation FD’s requirement that publicly traded companies disseminate material information to the entire market simultaneously — is presumptively nonconspiratorial; and earnings calls unquestionably serve an important pro-competitive purpose. Yet earnings calls involve antitrust risk. Antitrust class action complaints frequently quote statements in earnings calls or other public communications and try to characterize them as invitations to collude in order to withstand a motion to dismiss. Executives of publicly traded companies should avoid making statements in earnings calls or other public communications that could be construed as an invitation to their competitors to collude on price, output or other conditions of competition.

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