

ANTITRUST AND TRADE PRACTICES ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Public Disclosures of Future Business Plans – Potential Antitrust Risk

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Key Points:

- Statements made by companies in earnings calls and industry speeches that disclose business plans that appear to invite competitors' cooperation can potentially lead to private or governmental allegations of antitrust violations.

Recent Case Involving Public Disclosures that Resulted in Allegations of Antitrust Violations

Public disclosures that detail a company's future business plans may lead to potential antitrust liability, especially if the disclosures indicate that the business plans are contingent upon competitors' reactions.

In a recent federal district court decision, *In Re Delta/AirTran Baggage Fee Antitrust Litigation*, the plaintiffs alleged that Delta and AirTran, competitors for air travel in and out of Atlanta, reached various implicit agreements through public statements regarding their business plans. The alleged statements were made in public speeches, at airline conferences and in statements to investors and analysts in earnings calls. In these statements, the companies allegedly articulated future business plans that would benefit the industry, and their airline, only if competitors followed the same course of action. For example, Delta suggested that capacity be cut as a response to increased fuel prices, but indicated that "Delta can't do it alone. We have to do it in conjunction with other carriers." Both airlines then allegedly cut capacity on routes in which they competed.

The plaintiffs' theory was that such statements were indirect, disguised offers to the competitor to coordinate plans and agree to restrict fares, capacity, baggage fees, etc. By subsequently acting in accordance with their competitor's publicly suggested business plans, the parties essentially reached an agreement to restrain trade. A federal district court has refused to dismiss this case in the early stages of litigation. [Click here](#) to read the court's full opinion.

Recent FTC Action for Alleged Unilateral Invitation to Collude

In June 2010, the Federal Trade Commission (FTC) brought an invitation to collude case against U-Haul pursuant to Section 5 of the FTC Act.¹ Part of the allegations against U-Haul involved public

¹ Invitations to collude cases brought by the FTC under Section 5 do not require proof of an actual agreement or anticompetitive effects. Accordingly, the proof requirements are less rigorous than in a price fixing case under Section 1 of the Sherman Act.

statements made by U-Haul's CEO during an earnings conference call with industry analysts. The FTC alleged that the comments were essentially invitations to its competitor, Budget, to fix prices. The FTC did not allege that Budget agreed to any of the alleged invitations and accordingly did not take any action against Budget. Some of the actual statements made during the earnings conference call and the FTC's allegations of U-Haul's intent behind the comments can be read in the FTC's complaint ([Click here](#)). U-Haul entered into a consent decree with the FTC to resolve the matter.

What's Next?

Based on these recent developments, expect an increase in litigation and enforcement actions based on this theory. Companies making public statements about future business plans must exercise caution. This includes statements about, but not limited to, pricing, geographic markets or changes in output. The most risky statements will entail the company's perceptions, hopes or beliefs on how competitors may respond to its business plans.

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