

# Sending the Wrong Message? Antitrust Liability for Signaling

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**A**NTITRUST CHALLENGES TO invitations to collude and other “signaling” communications are increasing. In the last several years, both U.S. antitrust agencies have launched extensive investigations and the Federal Trade Commission has obtained consent decrees in multiple actions arising from unilateral statements by business executives. The private bar is close behind, having filed two dozen lawsuits in just the last year alleging the major airlines have violated the antitrust laws through signaling.

This article reviews the use of antitrust law to address conduct that does not necessarily seem at first glance to implicate the antitrust laws. Courts have been disciplined in refusing to find that a unilateral statement by a competitor, without more, can provide the basis for an “agreement” under Sherman Act Section 1. Courts have, almost always, rejected claims that signaling can support a monopolization claim under Sherman Act Section 2. And the federal courts have not substantiated the FTC’s challenge to signaling under FTC Act Section 5. Despite this questionable statutory authority, the Department of Justice and FTC continue to pursue this unilateral conduct.

The absence of clear authority, the acknowledged ambiguity of the conduct in question, and the lack of competitive harm suggest the need to consider an alternative to the current enforcement program. The agencies’ enforcement approach raises two questions for debate: Is signaling unlawful under the antitrust laws? Should it be?

## What Is a Signal?

We define signaling as a firm’s unilateral statement on competitive topics, likely to be heard by a competitor, but without an agreement. Signaling may include invitations to col-

lude or just public statements that do not seek explicit assent. While the FTC has for at least 30 years taken the position that signaling is unlawful, the agencies recently have stepped up enforcement efforts. Antitrust enforcement actions targeted at signaling conduct historically were limited to “invitations to collude,” whereby one firm solicits a horizontal competitor to enter into anticompetitive coordination. Recent investigations and enforcement efforts have not been so limited and have targeted unilateral disclosures of competitive information that could not be characterized as the solicitation of an agreement. We consider both forms of conduct to be signaling for the purpose of this article.

Signaling is not defined in the antitrust statutes or, given the limited case law, by the courts. However, one might get a consensus among antitrust advisors that a signal is defined as:

- (1) a unilateral statement,
- (2) likely to be heard by a competitor,
- (3) that communicates intended or proposed pricing, output, customer terms, or other dimensions of competition.

Each of these elements is important to distinguish signaling from other types of conduct within the antitrust mainstream. First, a signal is unilateral. Bilateral “signals” between firms can be analyzed as a potential Section 1 agreement. Second, a signal must be heard by a competitor for there to be any potential competitive harm, whether communicated privately (e.g., by telephone or email) or publicly (e.g., investor presentations). Third, a signal must contain some information that, when received by a competitor, potentially could lessen competition between the firms.

This definition of signaling captures all types of unilateral statements that have been challenged by the antitrust agencies and private plaintiffs. For example, a signal can include:

- A private invitation to collude by one competitor to another via telephone call.<sup>1</sup>
- A public invitation to coordinate on an earnings call.<sup>2</sup>
- A complaint about prices to a competitor/distributor.<sup>3</sup>
- Letters to trade publications regarding future pricing.<sup>4</sup>

Antitrust enforcers today might challenge any of these types of signaling conduct, even if unreciprocated. All raise the same risk that the signal will lead to coordination or will otherwise facilitate a Section 1 “agreement.” But even among invitations to collude—seemingly the category of signaling conduct most likely to give rise to anticompetitive harm—such communications can also involve legitimate business communications to customers or investors, even if they might also be suspected signals to competitors. Therefore, the entire range of signaling conduct can be analyzed together, even though there may be qualitative differences between a bare invitation to raise prices and an analyst discussion on forward-looking production plans.

## Potential Antitrust Liability for Signaling

U.S. antitrust enforcers have tried many statutory vehicles to combat signaling. The DOJ has challenged signaling under

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Sections 1 and 2 of the Sherman Act. The FTC has pursued signaling under Section 5 of the FTC Act, going beyond the reach of the Sherman Act. Private plaintiffs have relied on Sections 1 and 2 to seek damages. We review each statutory theory below.

**Signaling Under Sherman Act § 1.** The DOJ most frequently has pursued signaling conduct under Section 1, which prohibits “[e]very contract, combination . . . or conspiracy” in unreasonable restraint of trade.<sup>5</sup> To prove a Section 1 violation, a plaintiff must show the existence of an “agreement” that unreasonably restrains trade and that affects interstate commerce.<sup>6</sup> Like any contract, proving a Section 1 “agreement” often requires showing both an “offer” and “acceptance” by a competitor. In a typical Section 1 signaling case, a plaintiff uses the “signal” as evidence an offer was made, and then relies upon subsequent statements or conduct by a competitor to show “acceptance” of the offer.<sup>7</sup>

A Section 1 challenge to signaling presents two hurdles for the plaintiff. The first is determining that a public statement was an actual offer to enter into an anticompetitive agreement. Almost all companies make public statements or engage in some public chatter that likely is reviewed by competitors, whether at trade association meetings, in investor presentations, and even through pricing activities. Most always these statements are part of the company’s legitimate, ordinary business activities. Companies describe their capabilities to customers, announce price changes, and inform investors of plans and financial results.<sup>8</sup> To prevail on a Section 1 claim, the plaintiff and later the factfinder must sift through this overwhelming volume of routine communications to discern a clear “signal” that cannot be reconciled with legitimate business conduct.

Several courts have dismissed Section 1 claims where the alleged “signaling” was ambiguous. For example, in *Hall v. United Air Lines*, a putative class of travel agent plaintiffs alleged that several U.S. airlines conspired to cut or eliminate travel agent commissions through signaling.<sup>9</sup> Plaintiffs pointed to a series of trade press articles, trade interviews, and letters to trade publications as signals among airlines to eliminate commissions. The court rejected the allegation these statements were “signals” sufficient to support a claim under Section 1, noting the airlines had legitimate purposes for the communications that were “sufficient to rebut any implication that the letters were an attempt to communicate with competitors.”<sup>10</sup> Without an “offer,” there could be no Section 1 agreement.

The second hurdle for Section 1 plaintiffs is finding evidence of a competitor’s *acceptance*. If a competitor does not respond to a signal, there is no Section 1 liability because there is no “agreement.”<sup>11</sup> For example, in *United States v. American Airlines*,<sup>12</sup> a federal district court rejected the DOJ’s attempt to hold American Airlines liable under Section 1 for unilateral statements by its then-CEO. In what today would be labeled an “invitation to collude,” the CEO suggested to his counterpart at Braniff Airlines that both carri-

ers should raise prices by 20 percent. Braniff’s president not only declined, but reported the conversation to the DOJ. In the DOJ challenge to this conduct, under both Sections 1 and 2, the district court rejected the Section 1 claim because Section 1 only prohibits actual *agreements* among competitors; “it does not reach attempts.”<sup>13</sup>

Most signals are less explicit. For example, the *Hall* plaintiffs alleged “signals” made in news interviews and correspondence with trade publications.<sup>14</sup> The DOJ’s ongoing airline investigation apparently was triggered by executives’ public statements on “capacity discipline.”<sup>15</sup> In such cases, it is hard to determine with confidence that there was a signal or offer or to discern whether recipients “accepted” a signaled offer or just made parallel actions backed by independent business justifications. As the Supreme Court has recognized, leader/follower behavior and “conscious parallelism” are bona fide competitive interaction and do not alone violate Section 1.<sup>16</sup> Showing “acceptance” to a signal requires something more than similar conduct, it requires showing conduct that cannot be justified or explained as independent.<sup>17</sup>

The district court in *In re Delta/AirTran Baggage Fee Antitrust Litigation* struggled with these problems in deciding the defendant airlines’ motion to dismiss.<sup>18</sup> The putative class of passenger plaintiffs claimed Delta and AirTran conspired, through public signals on earnings calls and at industry conferences, to implement a first-bag fee and reduce capacity on routes in and out of Hartsfield-Jackson Atlanta International Airport. While the court declined to dismiss the plaintiffs’ Section 1 claims, it noted the difficulties these plaintiffs will face in proving an agreement due to Delta’s “potentially legitimate and lawful justifications” for imposing a first-bag fee following its merger with Northwest Airlines, which already had implemented a fee.<sup>19</sup> The court also noted that the airlines may have cut capacity due to the “uncertain economic climate” in 2008 and not because of any anticompetitive motivation, which would “provide Defendants a viable defense” to plaintiffs’ claims.<sup>20</sup> Thus, even if the plaintiffs could show a signal, the defendants potentially could escape liability if they can demonstrate legitimate business justifications for their subsequent behavior.

These two critical issues demonstrate that Section 1 is ill-suited for asserting antitrust liability based upon unilateral signaling conduct. Even if there is an explicit “offer” via signaling conduct, there can be no Section 1 liability if a competitor does not “accept.” Section 1 does not prohibit unilateral behavior, so the unilateral act of sending a signal cannot itself violate Section 1.

**Signaling Under Sherman Act § 2.** Plaintiffs and the antitrust enforcement agencies also have challenged signaling conduct under Section 2, which prohibits the acquisition and maintenance of monopoly power by anticompetitive conduct, or the dangerous probability of doing so for an attempted monopolization claim.<sup>21</sup> Unlike Section 1, a Section 2 claim does not require a plaintiff to prove an “agreement” to establish liability.

The DOJ pursued a Section 2 theory for unilateral signaling in the American-Braniff case mentioned above.<sup>22</sup> At the time that American's CEO made his call to Braniff's CEO, these were the two largest airlines at Dallas/Fort Worth airport. On the call, American's CEO suggested that the carriers both raise prices by 20 percent, citing potential entry by Delta.<sup>23</sup>

The district court dismissed the DOJ's Section 2 theory,<sup>24</sup> but the Fifth Circuit found the invitation could violate Section 2.<sup>25</sup> The court noted that American and Braniff jointly had a high share in a market with high entry barriers and that the two CEOs had the power to implement the proposed price-fixing plan, thus creating a dangerous probability it would have been successful had Braniff agreed.<sup>26</sup> Remanded to the district court, the case settled before a court could determine whether a Section 2 violation actually had occurred.

The American-Braniff case is the exception, for obvious reasons. First, Section 2 requires that the defendant have at the time or will gain monopoly power as a result of the conduct at issue (or that there is a dangerous probability the conduct will cause the defendant to acquire monopoly power).<sup>27</sup> Few firms actually have a monopoly, so demonstrating monopoly power is difficult. The allegation that the defendant would have benefited from signaling rivals suggests it in fact could not control prices or exclude competitors. The failure to establish monopoly power condemns many Section 2 cases.<sup>28</sup>

To address this problem, plaintiffs sometimes have used a "shared monopoly" or "joint monopolization" theory, arguing that multiple competitors that collectively possess market power can be held liable for joint monopolization. This was the DOJ's approach in the American-Braniff case. But the vast majority of courts have rejected "joint monopolization" on the grounds that collective action is governed by Section 1 and thus Section 2 is meant only to capture unilateral conduct.<sup>29</sup> While the American-Braniff case may technically remain good law, it is unclear whether even the Fifth Circuit would follow it today.

Second, even if a court accepted a joint monopolization theory, a plaintiff would have to show how competitor signaling resulted in the acquisition or maintenance of monopoly power. If anything, a monopolist's raising prices should invite entry to undercut supracompetitive pricing, not strengthen the monopoly power. Had Braniff agreed to increase prices, it is hard to imagine that somehow would enhance an American-Braniff joint monopoly, much less exclude rivals.<sup>30</sup>

These deficiencies, coupled with private plaintiffs' lack of success in pursuing Section 2 claims for signaling, suggest Section 2 is poorly suited to challenge signaling conduct. In this light, the American-Braniff case is best viewed as a historical anomaly. Since that decision in 1984, neither the DOJ nor the FTC has brought a signaling challenge under Section 2.

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**Signaling Under FTC Act § 5.** The Federal Trade Commission has also challenged signaling under Section 5 of the FTC Act, which prohibits "unfair methods of competition."<sup>31</sup> While the scope of the FTC Act is subject to debate, the FTC repeatedly has used Section 5 to address signaling.

The FTC first challenged signaling under Section 5 in *E.I. du Pont de Nemours & Co. v. FTC*, alleging four chemical companies each adopted practices to signal pricing to each other, leading to sales at uniform prices. The FTC alleged the chemical companies used press releases to announce price changes, giving greater advance notice of price increases than required by contract, and employed "most favored nation" clauses for more pricing uniformity.<sup>32</sup> In its administrative proceedings, the FTC concluded that the cumulative effects of these practices substantially lessened competition by facilitating "price parallelism" at prices higher than might have otherwise existed, despite no evidence of tacit or express collusion.<sup>33</sup> On appeal, the Second Circuit vacated the FTC's order, finding that Section 5 requires at least some "indicia of oppressiveness," such as evidence of anticompetitive intent or the absence of an independent, legitimate business reason for the conduct.<sup>34</sup> As each of the chemical companies provided legitimate justifications for the alleged signaling and the FTC otherwise failed to prove collusion, the Second Circuit vacated the FTC's order.

More recently, the FTC has settled a number of other signaling cases through consent decrees. For example, in *Valassis Communications*, the FTC claimed Valassis signaled to its largest competitor in freestanding newspaper inserts through quarterly analyst calls. The FTC cited statements by Valassis's CEO that it would "submit bids at a level substantially above current prices," "seek to retain its current share . . . but not to encroach upon [its competitor]'s position," and "monitor [its competitor]'s response to this overture."<sup>35</sup> To settle the FTC charges, Valassis agreed to refrain from similar unilateral, public statements.<sup>36</sup>

The FTC challenged similar statements in *U-Haul International*. There, U-Haul's CEO told analysts that it was "exercis[ing] price leadership" by raising rates and would maintain the higher rates so long as its competitor, Budget, did not respond by price cutting.<sup>37</sup> To settle the FTC's Section 5 claims, U-Haul also agreed to refrain from colluding or inviting collusion.<sup>38</sup> The FTC has settled through con-

sent decrees a number of other cases alleging direct invitations to collude in the last few years, including *Drug Testing Compliance Group*,<sup>39</sup> *Step N Grip*,<sup>40</sup> and *Nationwide Barcode*.<sup>41</sup>

Most recently, the FTC challenged a signaling case in which the “signal” was not as explicit. In *Fortiline*, a pipe manufacturer using a dual distribution model complained to a distributor-competitor after that firm reduced its prices significantly. Fortiline called the behavior “irrational” and suggested that the distributor-competitor’s approach would lower the prices Fortiline could charge.<sup>42</sup> The Commission claimed these communications amounted to signaling in violation of Section 5, though one Commissioner dissented on the grounds that the alleged “signal” was ambiguous.<sup>43</sup>

These cases are instructive. First, it is notable that the FTC has not yet convinced an Article III court that signaling constitutes a Section 5 violation, instead relying on consent decrees. In one of the few cases to consider the reach of Section 5, the Ninth Circuit in *Boise Cascade Corp. v. FTC* held that the FTC must show “either collusion or actual effect on competition” to support a Section 5 claim.<sup>44</sup> The FTC itself applies the same principle in its enforcement of Section 5.<sup>45</sup> By definition, unilateral signaling does not have an effect on competition, because it does not result in a Section 1 agreement. It then is not surprising that the only court that considered a Section 5 challenge to signaling rejected it.<sup>46</sup> Since unilateral signaling is not unlawful under Sections 1 or 2 of the Sherman Act, there is a real question whether Congress authorized Section 5 to reach that far.

Second, assuming that signaling conduct can in fact violate Section 5, in each case the FTC still should have to prove that a particular “signal” did not have independent business justification.<sup>47</sup> For example, the *du Pont* court rejected the FTC’s Section 5 claim on the grounds that the defendants showed legitimate business reasons, including customer demand, for each of the challenged practices.<sup>48</sup> If a Section 5 signaling case were to be tried, a court would need to balance any legitimate business justifications for the alleged signaling against any actual or potential anticompetitive harm that resulted from the signals. Moreover, a court would need to analyze whether a signal was purposeful or merely incidental to a legitimate business conduct, such as communications with potential investors.

In sum, while the FTC has had success in securing consent decrees in connection with enforcement challenges brought under Section 5 of the FTC Act, the federal courts have not substantiated the FTC’s theory that Section 5 reaches unilateral signaling conduct.

### Is Signaling Unlawful? Should It Be?

This review of signaling challenges under Section 1, Section 2, and Section 5 demonstrates the uncertainty as to whether signaling is unlawful. A unilateral signal lacks the “agreement” element for a Section 1 violation and lacks the exclusionary conduct requirement for Section 2. And while the FTC has challenged unilateral signaling conduct under Section 5, no

Article III court has held that Section 5 extends so far beyond the Sherman Act.

Perhaps the better question is whether unilateral signaling *should* be unlawful. Both antitrust agencies have staked a strong pro-enforcement position by challenging signaling under all these statutes. And it is a valid policy goal to discourage conduct that could facilitate anticompetitive coordination. On the other hand, conduct that may be labeled signaling also may be procompetitive. Firms often have legitimate reasons to communicate competitive information: informing customers about future pricing, disclosing financial details to investors, and interacting with parties with which it has both a vertical and horizontal relationship.

The difficulty with the current approach, in particular FTC’s use of Section 5, is that it creates significant uncertainty as to when a unilateral statement may later be seen to violate the antitrust laws. For example, a company may need to describe to investors its future plans for improving revenue or decreasing costs, but too much candor might be seen as unlawful.<sup>49</sup> Likewise, if a firm is contemplating a significant price increase, notifying customers well in advance may be in the customers’ best interest, particularly if the customer will seek to pass on the increase to downstream customers; but the agencies have challenged instances where too much notice potentially is anticompetitive.<sup>50</sup> And while the FTC has a string of consent decrees resulting from bare invitations to collude, even the Commissioners sometimes disagree over whether a statement is an “invitation” or not.<sup>51</sup>

Rather than relying on Section 2 or the undefined Section 5 to target signaling conduct, we think enforcers and courts should analyze signaling exclusively under Section 1: if the signal results in an anticompetitive agreement, then the signal may be challenged; otherwise, the unilateral communication should not be actionable under the antitrust laws. This would be authorized by the antitrust statutes and would cover the conduct most likely to be anticompetitive, while providing clarity and avoiding enforcement actions that potentially could capture or deter procompetitive business activity. There are several reasons to think this is preferable to the current approach.

*First*, if the conduct goes beyond signaling, where there is both an invitation to collude and acceptance, then it will violate Section 1. An agreement proved by direct or circumstantial evidence can support a Section 1 claim.

*Second*, robust enforcement against Section 1 agreements should deter competitors from signaling with illegitimate intent. A signal can suggest to an antitrust agency or private plaintiff that an unlawful conspiracy has taken place, drawing an investigation. For example, Valassis’s (very public) earning calls signal that it would not compete for competitor’s customers immediately led to an antitrust investigation for potential collusion. Similarly, the major airlines today currently face antitrust risk as they respond to a lengthy investigation and litigation over “capacity discipline” statements (already in somewhat ambiguous territory). Even if no

“agreement” was actually formed, and therefore no Section 1 case can be brought, the costs and risk offer a significant deterrent against signaling.

*Third*, focusing on Section 1 would ensure that signaling enforcement actions would not chill lawful, procompetitive conduct. As courts and the agencies have recognized, firms have legitimate reasons to ensure their investors, customers, and suppliers are informed. However, the FTC’s aggressive use of Section 5 has created significant ambiguity as to when a unilateral statement could be unlawful. Analyzing signaling solely under Section 1 provides immediate clarity to companies seeking to discuss pricing or other sensitive topics with third parties.

*Fourth*, the absence of evidence of assent, explicit or implicit, suggests there was no coordination, without which there has been no consumer harm. With only Section 1, bare invitations to collude would not be unlawful. But that does not leave consumer harm unremedied. To paraphrase the Ninth Circuit, “No harm, no foul.”<sup>52</sup>

Signaling remains a complicated issue, and firms using “signals” to communicate competitive intentions should expect scrutiny and risk antitrust challenge, even where the plaintiffs must prove an agreement. An enforcement program that did not reach beyond the established authority of Section 1 would bring benefits of authority, clarity, and focus only on certainly anticompetitive conduct. ■

effected by a “contract, combination . . . or conspiracy” between separate entities. It does not reach conduct that is ‘wholly unilateral.’”) (citations omitted).

- <sup>12</sup> 743 F.2d 1114.
- <sup>13</sup> *United States v. Am. Airlines Inc.*, 570 F. Supp. 654, 657 (N.D. Tex. 1983), *rev’d on other grounds*, 743 F.2d at 1119 (noting “our decision that the government has stated a [Section 2] claim does not add attempt to violations of Section 1 of the Sherman Act”).
- <sup>14</sup> *Hall*, 296 F. Supp. 2d at 672.
- <sup>15</sup> Roger Yu, *Justice Department Opens Probe of Airlines for Possible Collusion*, USA TODAY (July 1, 2015), <http://www.usatoday.com/story/news/2015/07/01/doj-opens-collusion-investigation-of-airlines/29578399/> (reporting that the DOJ opened an investigation into the airline industry for collusion after frequently discussing “capacity discipline” with investors).
- <sup>16</sup> *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (“[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.”); see *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (noting that “[t]acit collusion, sometimes called oligopolistic price coordination or conscious parallelism” is “not in itself unlawful”).
- <sup>17</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (“The correct standard [for Section 1] is that there must be evidence that tends to exclude the possibility of independent action. . . . That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.”).
- <sup>18</sup> 733 F. Supp. 2d at 1352.
- <sup>19</sup> *Id.* at 1362–63.
- <sup>20</sup> *Id.* at 1363.
- <sup>21</sup> 15 U.S.C. § 2.
- <sup>22</sup> 743 F.2d at 1120.
- <sup>23</sup> *Id.* at 1116.
- <sup>24</sup> *American Airlines*, 570 F. Supp. at 659 (The “proposition to [Braniff] was a unilateral invitation to affect a change in prices. . . . [T]he remedy does not lie in the antitrust laws.”).
- <sup>25</sup> *American Airlines*, 743 F.2d at 1121–22.
- <sup>26</sup> *Id.* at 1118–19.
- <sup>27</sup> *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).
- <sup>28</sup> *E.g., Delta/AirTran Baggage Fee Antitrust Litigation*, 733 F. Supp. 2d at 1366 (“Given the twenty-two-percent market share that AirTran is alleged to possess in the narrowest of route grouping proposed by Plaintiffs and the absence of any alleged conduct through which AirTran could oust Delta from any route, AirTran could not unilaterally achieve monopoly power.”).
- <sup>29</sup> See *id.* at 1366 n.14 (“The fact that a separate offense (a conspiracy claim) exists under the [Sherman Act] for concerted action pertaining to monopolization suggest that any joint monopoly theory must be brought pursuant to that subsection of the statute rather than pursuant to the ‘attempted monopolization’ prong.”); *Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 396–97 (E.D.N.Y. 2004) (“The idea of a ‘shared monopoly’ giving rise to Section 2 liability repeatedly has been received with skepticism by courts who have squarely addressed the issue.”) (collecting cases).
- <sup>30</sup> Note that the Fifth Circuit’s decision in *American Airlines* related solely to the defendant’s Rule 12(b)(6) motion to dismiss for failure to state a claim, not the ultimate merits determination. 743 F.2d at 1122.
- <sup>31</sup> 15 U.S.C. § 45.
- <sup>32</sup> 729 F.2d 128, 130 (2d Cir. 1984).
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.* at 139.
- <sup>35</sup> Complaint ¶¶ 11–16, *Valassis Commc’ns, Inc.*, FTC File No. 051-0008 (Apr. 28, 2006).

- <sup>1</sup> *United States v. Am. Airlines Inc.*, 743 F.2d 1114, 1116 (5th Cir. 1984).
- <sup>2</sup> Complaint ¶¶ 20–26, *U-Haul Int’l, Inc.*, FTC File No. 081-0157 (July 20, 2010).
- <sup>3</sup> Complaint ¶¶ 16–21, *Fortiline, LLC*, FTC File No. 151-0000 (Aug. 9, 2016).
- <sup>4</sup> *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 672 (E.D.N.C. 2003).
- <sup>5</sup> 15 U.S.C. § 1. See *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (Section 1 prohibits only agreements that restrict competition unreasonably).
- <sup>6</sup> *Standard Oil*, 221 U.S. at 58.
- <sup>7</sup> *E.g., In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1352 (N.D. Ga. 2010) (“Plaintiffs allege that AirTran invited Delta to collude (through a series of earnings calls with industry analysts and speeches/break-out sessions at industry conferences) so that both airlines could increase prices to consumers without losing any market share. Plaintiffs allege that Delta accepted this invitation and that the two airlines engaged in anticompetitive conduct by increasing prices through capacity reductions and imposing a first-bag fee.”).
- <sup>8</sup> See, e.g., *id.* at 1362 (denying defendant airlines’ motion to dismiss plaintiffs’ Section 1 claim, although noting “[t]he complaint has its weaknesses. For example, as Defendants highlight, many of Plaintiffs’ allegations are based upon statements made by Defendants’ executives in response to analysts’ questions. . . . Obviously, the fact that some of the alleged collusive communications came in response to questions may weaken the probative value of those statements.”); see also *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 113 (1975) (“[T]he dissemination of price information is not itself a per se violation of the Sherman Act.”).
- <sup>9</sup> 296 F. Supp. 2d 652.
- <sup>10</sup> *Id.* at 672.
- <sup>11</sup> *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (“Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade

- <sup>36</sup> Decision and Order ¶¶ II.A–B, Valassis Commc’ns, Inc., FTC File No. 051-0008 (Apr. 28, 2006).
- <sup>37</sup> Complaint ¶¶ 21–26, U-Haul Int’l, Inc., FTC File No. 081-0157 (July 20, 2010).
- <sup>38</sup> Decision and Order ¶¶ II.A–C, U-Haul Int’l, Inc., FTC File No. 081-0157 (July 20, 2010).
- <sup>39</sup> See Complaint ¶¶ 7–9, Drug Testing Compliance Grp., LLC, FTC File No 151-0048 (Jan. 29, 2016) (challenging a unilateral “First Call Wins” proposal in which firms would not compete for one another’s customers).
- <sup>40</sup> See Complaint ¶¶ 6–9, Step N Grip, LLC, FTC File No. 151-0181 (Dec. 16, 2015) (challenging email sent by one competitor to another suggesting they both sell their products at identical prices on Amazon.com).
- <sup>41</sup> See Complaint ¶¶ 10–22, 680 Digital, Inc., FTC File No. 141-0036 (Aug. 29, 2014) (challenging email solicitations requesting barcode competitors match one another’s prices).
- <sup>42</sup> Complaint ¶¶ 16–22, Fortiline, LLC, FTC File No. 151-0000 (Aug. 9, 2016).
- <sup>43</sup> Dissenting Statement of Maureen K. Ohlhausen, Fortiline, LLC, FTC File No. 151-0000 (Aug. 9, 2016).
- <sup>44</sup> 637 F.2d 573, 582 (9th Cir. 1980); see also *du Pont*, 729 F.2d at 141 (Section 5 violation requires a showing that “competition has been substantially lessened”).
- <sup>45</sup> See Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (2015) [hereinafter FTC Section 5 Statement] (taking position that “Section 5’s ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act”), [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813\\_section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813_section5enforcement.pdf). For more on this much-debated topic, see ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 660–69 (7th ed. 2012).
- <sup>46</sup> *du Pont*, 729 F.2d at 141–42.
- <sup>47</sup> See FTC Section 5 Statement, *supra* note 45.
- <sup>48</sup> *du Pont*, 729 F.2d at 133.
- <sup>49</sup> See, e.g., Dissenting Statement of Commissioner Orson Swindle, Stone Container Corp., FTC File No. 951-0006 (June 3, 1998) (“I am concerned that the Commission’s decision in this case may deter corporate officials from making useful public statements (e.g., in speeches to investors or presentations to securities analysts) that candidly address industry conditions, individual firms’ financial situations, and other important subjects.”).
- <sup>50</sup> See, e.g., *United States v. Airline Tariff Publ’g Co.*, 836 F. Supp. 9 (D.D.C. 1993) (approving consent decree in DOJ challenge to major airlines’ use of computerized fare exchange system to signal future pricing intentions); cf. *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 54 (7th Cir. 1992) (advance price announcements necessary in the construction industry because customers “bid on building contracts well in advance of starting construction” and so required 60 days’ or more notice of price changes).
- <sup>51</sup> See Dissenting Statement of Maureen K. Ohlhausen, Fortiline, *supra* note 43 (“The evidence regarding whether Fortiline made an invitation to collude . . . is ambiguous.”); Dissenting Statement of Commissioner Orson Swindle, Stone Container Corp., *supra* note 49 (“I do not believe that the facts unearthed and presented in the investigation support the allegation that Stone Container . . . invited its competitors ‘to join a coordinated price increase.’”).
- <sup>52</sup> *Boise Cascade*, 637 F.2d at 582 (“[T]he weight of the case law, as well as the practices and statements of the Commission, establish the rule that the Commission must find either collusion or actual effect on competition to make out a section 5 violation.”). Similarly, in many industries, a public “signal” will duplicate information learned elsewhere. For example, in *du Pont*, while the FTC believed that certain press releases and similar conduct relating to prices constituted signaling, the Second Circuit observed that “regardless of the practices, competitors learned of each other’s prices anyway within hours.” 729 F.2d. at 142.