Duff on Hospitality Law

Update on the Online Travel Company/Hotel Booking Antitrust Litigation: Plaintiffs Add New Defendants

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Don Scaramastra has provided an update for our readers on the status of the class-action involving online distributors and certain hotel operators with regards to antitrust laws related to online distribution. Catch up on the original post here and continue reading for an update on this topic. - Greg

On May 1, 2013, plaintiffs filed a consolidated amended complaint in the OTC/Hotel Booking Antitrust Litigation. The amended complaint formally consolidates the many different complaints that were consolidated before the federal district court in Dallas last December.

But the amended complaint does more; it names a number of additional defendants. Most are hotel companies: Wyndham Hotel Group, Carlson Hotel Group, Best Western, Choice Hotels, and Hyatt Hotels. But one notable new defendant, EyeforTravel, Ltd., is not. EyeforTravel describes itself as a global media company specializing in business intelligence for the travel and tourism industry. This post will focus on the allegations against EyeforTravel because they highlight issues and dangers different from those I covered in my last post regarding this case.

According to the amended complaint, EyeforTravel annually sponsored industry conferences that "became a forum where [unlawful] agreements were confirmed" and discussed. The amended complaint refers to brochures and announcements regarding these conferences, which indicate that topics discussed included "revenue management and price," "rate parity," "strategies for restriction of free pricing," "how large travel suppliers are dealing with pricing pressures attributed to third party distributors," "why rate parity is necessary," "best practices for managing revenue in a down market and avoid rate erosion," and the "dangers of chasing demand by lowering your prices."

None of the materials identified in the amended complaint contain any overt reference to an unlawful agreement among the defendants not to compete on room rates. Nor is the exchange of sensitive pricing information (assuming such exchanges ever occurred) per se illegal under the antitrust laws.

But the program titles noted above (without the benefit of any surrounding context) could lead to an inference that companies participating in the programs exchanged competitively sensitive information (such as information regarding future prices or pricing strategy) as part of an illegal price-fixing agreement. And that is exactly the inference the amended complaint asks the court to draw: that topics like the ones

identified above are in fact a poor disguise for discussions surrounding an agreement not to compete on price.

Meanwhile, these allegations offer a stark reminder of the antitrust risks of meetings between competitors ... and to trade organizations and others who organize such meetings. Simply put, it is not enough to obey the law and refrain from reaching price-fixing agreements. Meeting participants must, like Caesar's wife, be above suspicion. And that means participants should take care to avoid any discussions regarding business sensitive topics. This prohibition extends to topics such as

- current or future pricing, both generally and to specific customers;
- fair or reasonable profit margins;
- cash discounts or credit terms offered to customers;
- allocating customers or markets among competitors;
- reasonable or "appropriate" output levels;
- specific R&D, sales, or marketing plans, initiatives, or strategies;
- confidential or business-sensitive product, product development, or production plans, initiatives, or strategies; and
- refusing to deal with someone because of its pricing or distribution practices.

Meetings should have a clear written agenda of the topics to be discussed. Nothing in the agenda or other advance materials should even remotely suggest that competitively sensitive information will be exchanged or discussed. Minutes that accurately reflect what was discussed should be prepared, to document that nothing inappropriate took place. Consider having counsel present at meetings to help ensure that the conversation stays within legal bounds.

There should be no "off the record" or "off agenda" sessions. Even private social get-togethers during or after a conference are problematic. You may know that the beer you had with that friend who works for a competitor was just social. But what will others think? Antitrust practitioners are fond of quoting Adam Smith's observation that "people of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." The judge or jurors who decide your fate may well share this caustic view and may all too readily to leap to conclusions about what transpired between you and your friend. And don't assume that those private meetings will remain private. In litigation, expect other parties to obtain copies of your emails in your personal as well as work accounts, your texts and IMs, communications and information on your social media sites, your personal and professional calendars, the documents you accessed or modified on your work and home computers, your business expenditures, and your personal and professional phone records. And expect them to seek copies of these materials from the other meeting participants, too. Rare is the individual these days who meets with a business contact and leaves no electronic trace.

To sum up, trade organizations play a valuable role in our economy, something the federal antitrust enforcement agencies recognize. But hosting or participating in meetings attended by representatives of

competing businesses presents certain risks under the antitrust laws. Fortunately, you can mitigate these with some thoughtful preparation, careful organization, and accurate documentation...and perhaps a talk with an antitrust lawyer.

Questions about the pending litigation or the recommendations outlined above, please contact me or Greg.

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