

Antitrust Alert

Creditor Hedge Funds' Joint Negotiation of Preexisting Debt Not an Antitrust Violation

November 15, 2011

On November 10, 2011, in *CompuCredit Holdings Corp. v. Akanthos Capital Management LLC et al.*,¹ the United States Court of Appeals for the 11th Circuit held that the collaborative negotiation of preexisting debt did not constitute an illegal boycott under Section 1 of the Sherman Act,² rejecting CompuCredit's claims that the defendant hedge funds' alleged refusal to participate in a tender offer in order to inflate the redemption price of their notes violated the antitrust laws. The 11th Circuit decision, which is supported by existing precedent from other circuits, is likely to protect the ability of creditors to negotiate collectively with respect to debt obligations acquired via the secondary market. It extends case law that protected collective creditor action to collect preexisting debt to collective negotiation over such debt.

Background

In 2005, CompuCredit, a provider of credit and related financial services products, issued two series of long-term convertible promissory notes in a private placement. The notes subsequently traded on the secondary market and, as of December 2009, 70 percent of the notes were held by 21 hedge funds ("Funds") that subsequently became defendants. In December 2009, when CompuCredit announced its plan to issue a dividend and its intent to spin off its profitable microloan business, the Funds filed suit under the Uniform Fraudulent Transfer Act (UFTA), alleging that CompuCredit was insolvent and asked the court to enjoin the payment of the dividend and the spinoff to ensure that CompuCredit could pay back its debt obligations. The court denied the injunction, finding that CompuCredit was not insolvent.

CompuCredit then initiated a tender offer for up to \$160 million of its notes outstanding at a price purportedly at or above market value. When none of the Funds participated, CompuCredit alleged the existence of a conspiracy via their refusal to participate. Of the two originally issued series, CompuCredit was able to purchase back only 11 percent and 10 percent of the outstanding notes at 50 percent and 35 percent of face value, respectively. The Funds continued to assert that CompuCredit was insolvent. They wrote CompuCredit's auditor and contacted the Securities and Exchange Commission regarding the alleged insolvency, and, in March 2010, contacted the indenture trustee, claiming that CompuCredit violated the terms of the indentures. Finally, on March 8, 2010, the Funds made a collective demand that CompuCredit repurchase the series of notes at par value, which, at the time, had been trading at 53.5 percent and 37 percent of par value. CompuCredit refused and brought suit, alleging an unlawful conspiracy to boycott the tender offer to inflate the redemption price. The Funds moved to dismiss and, on June 17, 2011, the district court granted the motion.

¹ Case No. 11-13254, 11th Cir.

² 15 U.S.C. §1.



Antitrust Analysis

The 11th Circuit affirmed the district court's dismissal of CompuCredit's claims, finding that the behavior of the Funds did not constitute an antitrust violation. The 11th Circuit determined that an agreement among the creditors did not constitute a horizontal arrangement among competitors that was unquestionably a naked restraint of price and output in violation of the antitrust laws. Instead, the court found that, despite the trading of these instruments on the secondary market, CompuCredit was not similarly situated to a normal buyer of goods or services. It wanted to pay back the money it already owned, and the Funds' choice to reject the offer and seek full par value did not constitute a boycott to raise future sales prices. The court emphasized that the case before it involved preexisting debt, rather than the terms of future transactions. Because the par value was already fixed by agreement, the court found that the negotiations surrounding the repayment of debt to be factually dissimilar from a conspiracy to fix future prices in a market.

Finally, the court cited approvingly additional precedent from the 2nd and 7th circuits in support of its holding that a violation of the Sherman Act does not occur when debtors act collaboratively to collect preexisting debts. In the cases of *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*³ and *United Airlines v. U.S. Bank, N.A.*,⁴ the 2nd and 7th circuit courts of appeals both held that collective action or joint activity by creditors to collect the full amount of a preexisting debt did not violate antitrust law.

Implications

The 11th Circuit decision joins the view of the 2nd and 7th circuits upholding the rights of creditors in this particularly common context and, going forward, is likely to give creditors more leverage in negotiations with debtors with respect to the payment of existing debt obligations. As a practical matter, however, given that horizontal agreements between competitors or purchasers are often treated as per se violations of the antitrust laws, it is prudent to consult antitrust counsel when seeking to engage in collective negotiation practices regarding prices or terms.

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³ 691 F.2d 1039, 1052-53 (2d. Cir. 1982).

⁴ 406 F.3d 918, 921 (7th Cir. 2005).