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Eleventh Circuit Joins Second and Seventh Circuits in Rejecting Antitrust Claim Challenging Collective Action by Holders of Existing Debt

In a significant decision that reaffirms the extent to which holders of debt may engage in coordinated behavior with respect to a common issuer, the United States Court of Appeals for the Eleventh Circuit recently affirmed a judgment on the pleadings for a group of hedge funds in an antitrust case challenging the funds' actions under the Sherman Act. In doing so, the Eleventh Circuit followed prior decisions by the Second and Seventh Circuit and confirmed that holders of debt may act in concert in dealings with the issuer without fear of antitrust challenge.

The court, in *CompuCredit Holdings Corporation* v. *Akanthos Capital Management, LLC*, 661 F.3d 1312, 2011 WL 5419663 (11th Cir. 2011) (per curiam), rejected the issuer's assertion that a group of hedge funds holding its notes had violated Section 1 of the Sherman Act by coordinating to force the issuer to pay above-market prices for the early redemption of its notes.

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Plaintiff CompuCredit Holdings Corporation ("CompuCredit"), a provider of credit and related financial services products, sued a group of hedge funds that together held about 70% of its convertible senior notes. CompuCredit alleged that the hedge funds had engaged in a series of actions that constituted an unlawful restraint of trade.

The dispute began when CompuCredit announced a $25 million dividend to its stockholders and that it was considering a spinoff of its microloan business. In response, the funds sued CompuCredit, alleging that it had violated the Uniform Fraudulent Transfer Act ("UFTA") by attempting to distribute assets to insiders before creditors could recover. The funds lost their bid for a preliminary injunction, and CompuCredit issued its dividend as planned.

Shortly thereafter, CompuCredit offered to repurchase up to $160 million of its outstanding notes at prices it alleged were at market. All of the funds declined to participate in the tender offer, insisting that the redemption price was too low. At the same time, they continued to assert that CompuCredit was insolvent, writing letters to that effect to its auditor, the SEC, and the indenture trustee. Finally, the funds demanded that CompuCredit repurchase their notes at par, which, at the time, were trading between 53.5% and 37% of par. CompuCredit refused and brought this suit.

CompuCredit alleged that the funds had unreasonably restrained trade by boycotting its tender offer in order to inflate the price at which it could redeem its notes. The district court granted the funds' motion for judgment on the pleadings. CompuCredit appealed, and in a brief, per curiam opinion, the Eleventh Circuit affirmed the district court's order.

Like the district court, the Eleventh Circuit emphasized the factual posture of the case. Unlike a typical anticompetitive restraint, where the parties' coordination affects the price of a future purchase, the creditors had acted in concert with respect to a common issuer of debt previously secured. As a result, the funds' actions could not constitute a violation of the antitrust laws.

First, the court rejected the claim that defendants were "horizontal competitors engaged in a boycott of CompuCredit's tender offer."[1] The Court noted that "the preexisting debtor and creditor relationship differentiates this case" from *FTC* v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990), which held that a boycott amongst competitors had violated the Sherman Act.[2] Unlike an ordinary purchaser of goods or services who would be foreclosed from the market in the case of an anticompetitive boycott, CompuCredit was simply seeking to extinguish its existing debt, previously negotiated in a voluntary transaction free of any alleged coordination. As a result, the hedge funds' refusal to participate in the tender offer did not constitute an illegal boycott.

Second, the court observed that the hedge funds' actions could not be considered price-fixing because they concerned existing debt for which prices had already been fixed. The court distinguished *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), in which a group of beer wholesalers jointly stopped offering short-term credit to retailers. There, the Supreme Court deemed defendants' behavior to be illegal price-fixing because the refusal to extend credit had the effect of raising prices. By contrast, the Eleventh Circuit emphasized, CompuCredit had already agreed on a price for the notes, and "[n]egotiations about the repayment of a debt are factually dissimilar from a unilateral conspiracy to fix future prices in a market."[3] The court noted that both the Second and Seventh Circuits had reached the same conclusion, holding that creditors' efforts to collectively secure pre-existing debts did not violate the antitrust laws. *See United Airlines* v. *U.S. Bank, N.A.*, 406 F.3d 918 (7th Cir. 2005); *Sharon Steel Corp.* v. *Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982).

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The Eleventh Circuit's decision is notable for the additional clarity it offers to debt holders considering joint action.

By reaffirming that debt holders do not violate the antitrust laws when they coordinate in dealings with an issuer of existing debt, the decision confirms that debt holders may coordinate their actions. However, the Court's decision highlights the risks associated with coordinated action with respect to purchases of debt in the first instance, especially if such action would impact the price paid for that debt. Such activity is significantly more likely to be considered a violation of the Sherman Act.

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[1] *CompuCredit*, 2011 WL 5419663, at *2.

[2] *Id*.

[3] *Id*.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum may be addressed to any of the following:

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