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Alert

Antitrust/ Competition

Southern District of Florida Accepts *Nolo Contendere* Plea Against DOJ Objections

By Joseph Adamson

In *United States v. Florida West International Airways*, District Court Judge Scola in the US District Court for the Southern District of Florida granted the defendant's motion to enter a plea of *nolo contendere*.¹ The plea was allowed despite the Department of Justice's (DOJ) opposition to the defendant's motion. Such pleas are rare in federal court, especially in criminal antitrust cases. But Judge Scola found that the facts of this case were sufficiently unique to find that a *nolo* plea was appropriate.

***Nolo Contendere* Pleas in Antitrust Cases**

Unlike a guilty plea, a *nolo contendere* plea does not operate as an admission of guilt that can be used in subsequent criminal or civil proceedings, either as evidence of guilt or to estop the defendant from denying the facts admitted to in the plea.² A *nolo* plea is an admission of the elements of an offense charged in the case.³ Such a plea is "tantamount to an admission of guilt for the purposes of the case,"⁴ but allows a defendant to defend subsequent civil cases without a prima facie determination of guilt stemming from the entry of an adverse judgment in an antitrust case.⁵ A plea of *nolo contendere* is allowed by the Federal Rules of Criminal Procedure at the consent of the court, after considering "the parties' views and the public interest in the effective administration of justice."⁶

The DOJ opposes nearly all motions to plead *nolo contendere* as a matter of policy, opposing such pleas except when "the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest."⁷ *Nolo* pleas have been especially rare in antitrust cases since the revision of the Corporate Leniency Program (the Program) in 1993. The Program encourages self-reporting of anti-competitive behavior, and requires that Program applicants admit participating in collusion.⁸ The Government argues that the per se unlawful character of criminal antitrust cases and the prospect of treble damages in private antitrust cases help deter such unlawful activity,⁹ and that allowing *nolo contendere* pleas in antitrust cases would severely undermine the deterrent effects of private treble damages and undermine the incentives in the Program.

Florida West's *Nolo* Plea

Florida West was accused of conspiring with other airlines to raise the prices of air cargo transportation. Florida West's top officer, Rodrigo Hidalgo, "unbeknownst to Florida West, was secretly working for another company called LAN Cargo, S.A."¹⁰ Florida West argued that its circumstances were unique and warranted a *nolo contendere* plea. The company relied on Hidalgo's deceit and a finding by the Magistrate Judge that FWIA "may have a compelling defense to criminal liability based on this argument [of non-imputation based on Hidalgo's dual employment]. ..."¹¹

The United States argued that allowing FWIA to plead *nolo contendere* would undermine the goals of the Program. The Program requires companies and individuals applying for favorable treatment to cooperate fully with the government. The DOJ argued that allowing a *nolo* plea would undermine the program by allowing the defendant FWIA to “potentially be rewarded with a better result than amnesty applicants under the Program.”¹²

The court found that the facts of this case were sufficiently unique that there were unlikely to be any effects on the Program in the future. The ruling was based largely on the conduct of Mr. Hidalgo, and the fact that he was actively deceiving FWIA. The court noted the Government's opposition, but also noted that the Government's counsel conceded that in more than twenty years, there was not a single case where he had agreed that a *nolo* plea would be appropriate.¹³ The court also rejected the Government's argument that a *nolo* plea would allow the defendant to escape with minimal consequences in subsequent civil cases because neither party had identified any pending civil actions, and any statutes of limitations had likely passed since the case had begun.¹⁴

Nolo Contendere Pleas in Future Antitrust Cases

Although this case marks a departure from the general practice of rejecting *nolo contendere* pleas in antitrust cases, it is unclear what effect it will have on future *nolo* pleas. The court noted that this case “literally involves cloak and dagger-like facts” in Hidalgo's secret employment with a competing airline.¹⁵ The court's willingness in this case to grant the *nolo* plea despite the Government's opposition may provide a guide to the types of “unusual” cases in which the Government may decide not to oppose future motions for entry of a *nolo contendere* plea. Likewise, this decision may provide defendants with an example of the sorts of facts and circumstances that may lead a court to reject the DOJ's opposition and grant a plea of *nolo contendere*. But such pleas may continue to be rare, as most companies may prefer to negotiate a plea agreement prior to an indictment, rather than fight the DOJ and push for a trial or for the limited possibility that the facts of a case may warrant another *nolo* plea.

1 *United States v. Florida West Int'l Airways, et al.*, 10-cr-20864 (Order, July 20, 2012).

2 See FED. R. EVID. 410(a)(2); see also *Doherty v. Am. Motors Corp.*, 728 F.2d 334, 337 (6th Cir. 1984).

3 *Lott v. United States*, 367 U.S. 421, 426 (1961).

4 *Id.* (internal quotations omitted).

5 *Cf.* 15 U.S.C. § 16 (Section 5 of the Clayton Act, providing that a final criminal antitrust judgment is *prima facie* evidence against the defendant in subsequent civil actions).

6 FED. R. CRIM. P. 11(a).

7 Principles of Federal Prosecution, 9-27.500.

8 James M. Griffin, “The Modern Leniency Program After Ten Years,” ABA Section of Antitrust Law Annual Meeting, Aug. 12, 2003.

9 *United States v. Florida West Int'l Airways, et al.*, 10-cr-20864 (Defendant's motion, docket entry 249, April 27, 2012).

10 *United States v. Florida West Int'l Airways, et al.*, 10-cr-20864 (Order, docket entry 274, July 20, 2012).

11 *United States v. Florida West Int'l Airways, et al.*, 10-cr-20864 (Defendant's motion, docket entry 249, April 27, 2012) (brackets in original).

12 *United States v. Florida West Int'l Airways, et al.*, 10-cr-20864 (Gov't Opp'n, docket entry 250, May 10, 2012).

13 *United States v. Florida West Int'l Airways, et al.*, 10-cr-20864 (Order, docket entry 274, July 20, 2012).

14 *Id.*

15 *Id.*

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