

# *In re Valassis:* Standing in The Shadow of Bob Crandall



**Antitrust Enforcers Challenge  
Conference Call With Securities  
Analysts As An Invitation to Collude**

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**Fredrikson**  
& BYRON, P.A.

**RICHARD WEGENER** | FREDRIKSON & BYRON PA | 200 South Sixth Street |  
Suite 4000 | Minneapolis, MN 55402 | 612.492.7323 | [rwegener@fredlaw.com](mailto:rwegener@fredlaw.com)

# Outline

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# Background

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- Before the airlines turned to bankruptcy as a competitive strategy, competition centered on price and service. American Airlines was the first to recognize the value of filling empty seats with discounted tickets now known as "Super Saver Fares." These tickets offered deep discounts for advance-purchase tickets and outsold cheap charter competition.
- In 1983 American Airlines strayed from this competitive formula when its president, Bob Crandall, called the president of competing carrier Braniff Airlines and said: "I think it's dumb as hell . . . to sit here and pound the \*\*\*\* out of each other and neither one of us making a \*\* dime. . . . Raise your goddamn fares twenty percent. I'll raise mine the next morning."
- The next morning Crandall instead learned that Braniff's president had recorded the conversation and blown the whistle.
- When the Department of Justice had some trouble equating a rejected invitation to collude with a Section 1 price fixing conspiracy, it successfully prosecuted American for attempted monopolization under Section 2 of the Sherman Act. *U.S. v. American Airlines, Inc.*, 743 F.2d 1114 (5<sup>th</sup> Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985).

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# Background

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- With the benefit of Justice's experience, subsequent invitation-to-collude cases have generally been brought by the FTC.
- Utilizing the more flexible standard of Section 5, subsequent enforcement actions have been resolved with consent orders. It has made little difference that the invitation to collude remained unaccepted by the competitor. *MacDermid, Inc.*, \_ F.T.C. \_ (C-3911) (1999); *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Molding Co.*, 122 F.T.C. 104 (1996); *YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

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## Valassis: King of the FSIs

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- Valassis Communications, Inc. (NYSE: VCI), a Fortune 400 marketing company, is one of the nation's two leading producers of newspaper "Free Standing Inserts." Valassis sells space for advertising and coupons in its four-color FSI booklets, which are distributed to some 60 million households through about 550 Sunday newspaper editions.
- Valassis' single domestic FSI competitor, News America Marketing, also enjoys about 50% of the market.
- In June 2001, Valassis notified its clients of a five percent price increase. News America did not follow the Valassis price advance. As a result, News America captured additional customers and built a substantial market share lead.
- In February 2002, Valassis abandoned its price increase and sought to regain its previous market share.

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# The Conference Call

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- In mid-2004, Valassis – unable to return to previous market share levels – adopted a new strategy. Valassis decided to communicate to News America an offer to cease competing for News America customers, provided that News America ceased competing for Valassis customers. If accepted, both firms could raise FSI prices within their respective protected customer bases and end their price war.
- As a publicly traded company, Valassis holds a conference call with securities analysts on a quarterly basis. Any person may listen to the call live over the Internet or obtain a transcript of the call from the Valassis website.
- The shadow of Bob Crandall must have been in the room when Valassis senior management, including CEO Alan Schultz, spoke with securities analysts during a July 22, 2004 conference call.

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# The Conference Call

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- To ensure that News America clearly understood the terms of Valassis' offer, including what Valassis expected in return, Schultz opened the conference call by proposing how the FSI market should be coordinated, and did so with extraordinary specificity.
- Valassis would cease competing for News America customers, provided that News America likewise cease competing for Valassis customers. In addition, Valassis proposed that prices should be restored by both firms to the pre-price war levels, and Schultz described how business with shared customers and outstanding bids to News America's customers would be handled.
- Valassis would monitor News America's response, looking for "concrete evidence" of reciprocity in "short order." If News America continued to compete for Valassis customers and market share, then the price war would resume.

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## The Conference Call

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- The public statements made by Valassis went far beyond legitimate business disclosures. For example, Valassis specified how it proposed to split the business of those customers it shared with News America and explained what its pricing would be with regard to pending bids to four News America customers. Valassis historically had not provided information of this type to the securities community; analysts had no need for the information and did not report it.
- Valassis' invitation to collude did not go unnoticed by federal antitrust enforcers.
- Valassis agreed to a consent order that bars the company from inviting any competitor to divide markets, allocate customers, or fix prices. *In re Valassis Communications, Inc.*, \_ F.T.C. \_ (C-4160) (Apr. 28, 2006).

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# Implications for Counsel

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- It has been nearly a quarter of a century since Bob Crandall earned a place in antitrust textbooks by inviting Braniff to raise its “goddamn fares.”
- While the *American Airlines* lessons may have been forgotten (or never learned) by Valassis management, the proceeding remains one of enormous implications.
- There is a fine line between permissible “price signaling” and prohibited “invitations to collude.”
- Simply announcing price changes in advance via public statement or conference call is not generally unlawful, even in a market with few sellers. Public announcements may allow customers to stock up at the old price and cushion the impact of the price increase.
- However, an understanding among competitors as to how to respond to such announcements, as well as the act of soliciting such a response, can be troublesome.
- The *Valassis* proceeding should remind everyone that even the discussion of behavior that would violate the antitrust laws can, given the right circumstances, be a violation. Therefore, counsel must take pains to make clients understand how early in the game they can find themselves in hot water when issuing public pricing or strategy statements.

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## ANTITRUST AT FREDRIKSON

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Fredrikson has broad-based antitrust and trade regulation litigation and counseling practices.

Our antitrust and trade regulation experience includes appearances before the federal circuit courts of appeals, federal district courts and state courts and advocacy before the Department of Justice, the FTC, state Attorneys General, and federal and state regulatory agencies. We have defended corporations and individuals in antitrust grand jury proceedings investigating alleged price fixing conspiracies, and we have handled price fixing, monopolization and many other types of antitrust and trade regulation claims.

For more than thirty years, our leading practitioners have provided counseling in all aspects of antitrust and trade regulation law. We offer antitrust counseling with respect to product distribution and marketing, joint venture and cooperation agreements, patent licensing and other situations that bring competitors together to achieve a desirable business objective without incurring undue risk.

Other areas in which we provide antitrust and trade regulation counseling services include:

- Development of antitrust compliance programs and monitoring and auditing the effectiveness of those programs;
- Price discrimination claims under the Robinson-Patman Act and various state variations of that statute;
- Hart-Scott-Rodino pre-merger reporting requirements and compliance; and
- Coordination of merger filings and investigations worldwide.

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## RICHARD J. WEGENER

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Dick Wegener, a Fredrikson shareholder, has practiced antitrust and trade regulation law with a special emphasis on product distribution and marketing for more than twenty-five years.

Before returning to private practice in 1989, he served as Division Counsel to the United States Food Group of The Pillsbury Company and Assistant to the General Counsel for Antitrust and Trade Regulation.

Dick is a member of the Advisory Board for the Bureau of National Affairs' *Antitrust and Trade Regulation Report* [BNA ATRR], the world's leading weekly antitrust and trade regulation publication, and *The Antitrust Counselor*, a key monthly publication for those who advise clients in these important areas. He is a frequent speaker and writer on government regulation of the marketplace and the business and litigation aspects of distribution and marketing. Based on a survey of practicing attorneys, he is listed by the American Research Corporation as a "Leading Attorney" in antitrust and trade regulation law.

Dick can be reached by phone at (612) 492-7323 or by email at [rwegener@fredlaw.com](mailto:rwegener@fredlaw.com).