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Transportation Antitrust Cases, 2007

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This report summarizes reported antitrust decisions in 2007 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2007 that included antitrust related transportation decisions for 2006.

Civil Actions – Air Transportation

McCagg v. Marquis Jet Partners, Inc., 2007 U.S. Dist. LEXIS 61020, 2007-1 Trade Cases ¶ 75,803 (No. 05-CV-10607; S.D.N.Y. March 29, 2007)

In *McCagg*,, the plaintiff alleged that Marquis had monopolized the market for "25-Hour Jet Cards," which provide fractional ownership shares in aircraft, in violation of § 2 of the Sherman Act (15 U.S.C. § 2). The U.S. District Court for the Southern District of New York held that the plaintiff, as a shareholder in a potential new entrant, did have standing to assert an antitrust claim on behalf of the company. But the court also held that the market had been defined too narrowly, since there was no plausible reason that other fractional jet cards, such as for 10 hours or 50 hours, were not included. The court subsequently denied a motion for reconsideration, explaining that plaintiff still had failed to define a plausible market, and in any case it was unlikely that the plaintiff would be able to sufficiently plead market power. See 2007 U.S. Dist. LEXIS 54516, 2007-1 Trade Cases ¶ 75,804 (S.D.N.Y. July 27, 2007). An appeal to the U.S. Court of Appeals for the Second Circuit (No. 07-3728) subsequently was withdrawn.

Med Alert Ambulance, Inc. v. Atlantic Health System, Inc., 2007 U.S. Dist. LEXIS 57083 (No. 04-CV-1615; D.N.J. August 6, 2007)

Plaintiff *Med Alert* asserted that the defendants had conspired in violation of § 1-2 of the Sherman Act (15 U.S.C. § 1-2) and state antitrust law (N.J. Stat. § 56:9-3 - 9-4) to exclude it from the specialty care transport market by a tying arrangement between their hospital facilities and the use of their in-house ambulance company. The U.S. District Court for the District of New Jersey held that there was insufficient evidence of tying to support Med Alert's claim of § 1 tying under the per se rule, but there were genuine issues of material fact sufficient to preclude summary judgment for its claim under a rule of reason theory. For the same reasons, the court held that there were genuine issues of material fact sufficient to preclude summary judgment on Med Alert's § 2 monopolization claim.

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In re Travel Agent Commission Antitrust Litigation, 2007 U.S. Dist. LEXIS 79918, 2007-2 Trade Cases ¶ 75,933 (No. 03-CV-30000; N.D.Ohio October 29, 2007)

In this case, the plaintiffs alleged that the defendant airlines conspired to reduce and eliminate travel agent commissions in violation of § 1 of the Sherman Act (15 U.S.C. § 1), and had opted out of another case that had already been dismissed. The U.S. District Court for the Northern District of Ohio dismissed the case against all of the defendants for reasons including that the plaintiffs had not met the pleading standard set forth by the U.S. Supreme Court in Bell Atlantic Corp v. Twombly, 127 S. Ct. 1955 (2007); the plaintiffs alleged parallel conduct without any evidence of an actual conspiracy among the defendants. An appeal is pending in the U.S Court of Appeals for the Sixth Circuit (No. 07-4464).

Love Terminal Partners LP v. City of Dallas, 2007 U.S. Dist. LEXIS 80736, 2007-2 Trade Cases ¶ 75,964 (No. 06-CV-1279; N.D.Texas October 31, 2007)

In *Love*, the plaintiff stated that the City of Dallas conspired in violation of § 1-2 of the Sherman Act (15 U.S.C. § 1-2) to demolish a terminal and otherwise reduce competition at Dallas Love Field Airport. Love Terminal Partners acknowledged that the plan later was ratified by federal law (the Wright Amendment Reform Act of 2006) but argued that Dallas, Ft. Worth, and the other defendants' conduct before its enactment was nevertheless actionable. The U.S. District Court for the Northern District of Texas disagreed, holding that the defendants' prior conduct was shielded by the Noerr-Pennington doctrine and that their subsequent conduct was compelled by the new statute, and alternatively that plaintiffs had not suffered any antitrust injury An appeal is pending in the U.S Court of Appeals for the Fifth Circuit (No. 07-11215).

Tokarz v. LOT Polish Airlines, 2007 U.S. App.. LEXIS 29688 (No. 06-5574; 2d Cir. December 21, 2007)

Tokarz alleged that defendant LOT had violated § 1 of the Sherman Act (15 U.S.C. § 1) and New York antitrust law (N.Y. Gen Bus. Law § 340) by terminating its authority to sell LOT tickets and an ancillary commission agreement. Tokarz asserted that competing travel agencies had complained to LOT that his agency had undercut their prices by retaining fewer commissions from LOT. The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of the case by the trial court, explaining that Tokarz had failed to establish any antitrust claims against LOT, because the complaints by other agencies had not been shown to be part of a conspiracy, and thus LOT's decision to terminate Tokarz had been unilateral.

Civil Actions – Surface Transportation

Capital City Cab Service, Inc. v. Susquehanna Area Regional Airport Authority, 470 F. Supp.2d 462, 2007-1 Trade Cases ¶ 75,677 (No. 06-CV-671; M.D.Penn. April 18, 2007).

Capital City Cab averred that the Airport Authority's exclusive operating agreement with another taxi service violated § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Eastern District of Pennsylvania previously had dismissed Capital City's claims but with leave to amend its complaint. The court held that the amended complaint also failed to state a claim under the Sherman Act, because Capital City's definition of the relevant antitrust market as being only Harrisburg International Airport was unreasonable.

County of Milwaukee v. Williams, 732 N.W.2d 770 (Nos. 2005AP2686 and 2005AP2687; Wisc. June 12, 2007).

The plaintiff County complained that a Milwaukee ordinance requiring a permit to pick up taxi passengers at General Mitchell International Airport violated Wisconsin antitrust law (Wis. Stat. § 133.01), and other state statutes. The plaintiffs argued that even if traffic or safety considerations justified some regulation of competition at the airport, the permit requirement was excessively restrictive. With respect to antitrust law, the Supreme Court of Wisconsin affirmed the validity of the requirement. The court explained that the antitrust law did not override other state laws, such as the Wisconsin law which specifically empowered Milwaukee to operate and regulate the airport, and which included authority to regulate ground transportation at the airport.

Truck-Rail Handling, Inc. v. The Burlington Northern and Santa Fe Railway Co., 2007 U.S. App. LEXIS 17168, 2007-2 Trade Cases ¶ 75,788 (No. 05-16552; 9th Cir. July 13, 2007).

Plaintiffs asserted that BNSF's requirement that transload operators sign a service agreement with BNSF as a condition of leasing transload terminals violated §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the case by the trial court, explaining that the plaintiffs had presented insufficient evidence to show that BNSF dictated rates in violation of § 1 of the Sherman Act, and because plaintiffs had defined the relevant product market too narrowly and failed to present sufficient evidence for the purposes of § 2 of the Sherman Act.

Civil Actions – Ocean Transportation

Menkes v. St. Lawrence Seaway Pilots Association, 2007-1 U.S. Dist. LEXIS 3640, 2007-1 Trade Cases ¶ 75,570 (No. 06-CV-339; N.D.N.Y. January 18, 2007).

Plaintiff Menkes claimed that the SLPSA had attempted to monopolize the ship pilotage business in violation of the Sherman Act (15 U.S.C. § 1) and New York antitrust law (Gen Bus. Law § 340, otherwise known as the "Donnelly Act"). The U.S. District Court for the Northern District of New York dismissed the complaint, explaining that the SLPSA had not taken any actions that would affect the ability of a qualified competitor to enter the market. The court noted that the Coast Guard required pilots to be members of SLPSA, and thus concluded that the matters complained of by the plaintiff – such as SLPSA's membership fees and rules – were not in themselves anti-competitive. The case has been appealed to the U.S. Court of Appeals for the Second Circuit (no. 07-373).

Island Express Boat Lines, Ltd. v. Put-in-Bay Boat Line Co., 2007 Ohio App. LEXIS 977, 2007 Ohio 1041, 2007-1 Trade Cases ¶ 75,634 (No .E-06-002; Ohio App. March 9, 2007).

Island Express Boat Lines asserted that defendant Put-in-Bay Boat Line attempted to monopolize the market for ferryboat service on Lake Erie in violation of Ohio antitrust law (§ 1331, otherwise known as the "Valentine Act"). The trial court had entered partial summary judgment in favor of Put-in-Bay, and the Ohio Court of Appeals affirmed. The court explained that the relevant market was not just for late-night high-speed ferry services but all ferry services, as well as that Island Express did not allege sufficient facts to establish a conspiracy under this definition of the market.

In re: Parcel Tanker Shipping Services Antitrust Litigation, 2007 U.S. Dist. LEXIS 33687, 2007-1 Trade Cases ¶ 75,713 (No. 03-MD-1568; D.Conn. May 4, 2007).

In *Parcel Tanker*, the plaintiff, an operator of chemical parcel tankers, complained that competitors had engaged in a conspiracy to fix the price of international shipments of liquid chemicals, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the District of Connecticut held that even though the plaintiff had not asserted any direct harm to its business, and the competitors operated over different routes than the plaintiff, it nevertheless could have suffered antitrust injury from the competitors' alleged predatory lowering of prices and related anti-competitive conduct, as well as that a predatory pricing claim had been sufficiently pled.

Duck Tours Seafari, Inc. v. City of Key West, Florida, 2007 Fla. App. LEXIS 18120 (No. 3D05-1864; Fla.. Dist. App. November 14, 2007).

The Court of Appeals of Florida, Third District, affirmed that defendant City of Key West had violated Florida state antitrust law by enacting ordinances that effectively prohibited Duck Tours from operating tours that competed with the two existing tour operators in the City. The court also held that the ordinances violated the Commerce Clause of the U.S. Constitution. However, the court also held that the City of Key West was entitled to a new trial on damages, because the trial court had computed damages based on Duck Tours' lost profits, instead of its market value at the date it was driven out of business.

United States v. Stolt-Nielsen S.A., 2007 U.S. Dist. LEXIS 88011, 2007-2 Trade Cases ¶ 75,962 (No. 06-466; E.D.Penn. November 29, 2007).

The Department of Justice sought to prosecute the defendant and two of its executives for violations of § 1 of the Sherman Act (15 U.S.C. § 1), despite Stolt-Nielsen's participation in the department's corporate leniency program. DOJ argued that Stolt-Nielsen had breached the agreement by failing to disclose that it had continued to participate in a conspiracy to fix the price of international shipments of liquid chemicals, and thus could be prosecuted. The U.S. District Court for the Eastern District of Pennsylvania held that DOJ could not proceed because Stolt-Nielsen had not made any misrepresentations in the agreement that would entitle DOJ to void it, and in any case there was no credible evidence that Stolt-Nielsen had continued to participate in a conspiracy.

Department of Justice

On April 10, 2007, the DOJ announced that it would not oppose a proposal by the National Association of Small Trucking Companies to conduct an operational and financial survey of small- and medium-sized trucking companies. The survey data will be shared with transport companies to enable them to benchmark themselves. The DOJ concluded that safeguards – including that the survey would be conducted by a third party and that it would include only aggregated data that was at least three months old – would ensure that the survey did not result in the exchange of competitively sensitive business information.

On July 31, 2007, the DOJ announced that Air Van Lines International, Inc. – a freight forwarder based in Washington – had agreed to plead guilty and pay a $143,040 fine due to its

participation in a conspiracy with other freight forwarders to fix the prices for shipments of household goods of military and civilian personnel between foreign countries and the United States in violation of § 1 of the Sherman Act (15 U.S.C. § 1). Subsequently, on October 17, 2007, DOJ announced that Lift Forwarders, Inc. of Oregon also had agreed to plead guilty, and would pay a fine of $140,000. Six other freight forwarders previously had plead guilty and paid fines ranging from $72,600 to $6 million to the DOJ.

On August 1, 2007, the DOJ announced that British Airways PLC and Korean Air Lines Co. Ltd. each had agreed to plead guilty and pay separate $300 million fines due to participation in conspiracies to fix the prices of passenger and cargo flights. British Airways participated in a conspiracy for flights between the U.S. and the United Kingdom; Korean Air participated in a conspiracy for flights between the U.S. and South Korea. Ten British Airways and seven Korean Air executives were "carved out" from the plea agreements, and thus could be prosecuted by DOJ at a future date. In U.S. v. Korean Air Lines Co. Ltd., 505 F. Supp.2d 91, 2007-1 Trade Cases ¶ 75,936 (No. 07-CR-324; D.D.C. August 22, 2007), the court held that the carved-out employees were not entitled to the redaction of their names, since their identification did not amount to an accusation that they were co-conspirators. Subsequently, DOJ announced that Qantas Airways had agreed to plead guilty and pay a $61 million fine due to participation in a conspiracy to fix the price of cargo flights.

Department of Transportation

On February 13, 2007, the DOT approved an application pursuant to 49 U.S.C. §§ 41308 and 41309 to expand the scope of the antitrust immunity that the DOT previously had granted to Star alliance air carriers. The DOT previously had immunized a group comprised of Austrian Airlines, BMI British Midland, Lufthansa, SAS, and United; the application added Air Canada, LOT Polish Airlines, Swiss International Air Lines, and TAP Air Portugal. The DOT concluded that the expansion of the immunized grouping to include these additional air carriers would be in the public interest and would not reduce or eliminate competition.