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Transportation Antitrust Cases, 2008

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This report summarizes reported antitrust decisions in 2008 that involved transportation companies. It updates the TLA Committee on Antitrust and Unfair Practices report issued in April 2008 that included antitrust related transportation decisions for 2007.

Civil Actions – Air Transportation

Rectrix Aerodome Centers, Inc. v. Barnstable Municipal Airport Commission, 534 F. Supp.2d 201, 2008-1 Trade Cases ¶ 76,045 (No. 06-11246; D.Mass. February 15, 2008).

In this case, the plaintiff, a fixed base operator (FBO) alleged that an airport commission had monopolized the sale of jet fuel, in violation of § 2 of the Sherman Act (15 U.S.C. § 2) and state antitrust law (Mass. Gen. Laws ch. 93, § 4). The U.S. District Court for the District of Massachusetts held that the airport commission was immune from antitrust liability pursuant to the state action doctrine. The court explained that its conduct was authorized by the legislation underlying the airport commission, which clearly articulated and affirmatively expressed a state policy to displace competition with regulation or monopoly public service. The court also noted that the plaintiff's allegation that the airport commission was illegally diverting funds for town use was irrelevant to the immunity analysis, and that there was no market participant exception to the immunity analysis.

In re: Korean Air Lines Co., Ltd. Antitrust Litigation, slip opinion (No. 07-01891; C.D.Calif. June 25, 2008).

In this case, the plaintiffs alleged that Korean Air Lines and Asiana had conspired to fix prices on passenger flights between the U.S. and South Korea, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Central District of California held that plaintiffs had sufficiently plead claims based on travel that began in Korea to be allowed discovery, but noted that the Foreign Trade Antitrust Improvements Act of 1982 (15 U.S.C. § 6a) ultimately might exclude those claims, if travel originating in the U.S. and Korea were separate markets. The court also held that plaintiffs had sufficiently plead their claims under the standards set out in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), for one-way and

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round-trip travel that began and ended in the U.S. and Korea, but not for travel where the original departure or ultimate arrival country was not Korea or the U.S.

Alaska Airlines, Inc. v. Carey, 2008-2 Trade Cases ¶ 76,324 (No. 07-5711; W.D.Wash. July 11, 2008).

In this case, the defendants alleged that Alaska Airlines and certain of its employees had conspired to prevent a travel agency's customers from aggregating and using its frequent flyer miles, in violation of § 1-2 of the Sherman Act (15 U.S.C. § 1-2), and had filed counterclaims in response to a complaint filed against them by Alaska Airlines. The U.S. District Court for the Western District of Washington held that defendants had not asserted a plausible counterclaim for conspiracy, because they had not plead any facts to suggest one exists. The court also noted that as a matter of law employees cannot conspire with their employer. But to the extent that the defendants asserted antitrust allegations that were not grounded in conspiracy, the court held that the counterclaims were sufficient to withstand a motion to dismiss. In a separate opinion (2008-2 Trade Cases ¶ 76,397 (No. 07-5711; W.D.Wash. November 18, 2008)), the court also dismissed the claims against Alaska's software developer.

In re: Korean Air Lines Co., Ltd. Antitrust Litigation, 567 F.Supp.2d 1213, 2008-2 Trade Cases ¶ 76,272 (No. 07-01891; C.D.Calif. July 23, 2008).

In a second decision involving Korean Air Lines, U.S. District Court for the Central District of California held that claims which were asserted pursuant to state antitrust laws were preempted by the Airline Deregulation Act (49 U.S.C. § 41713), which prohibits a state from enacting or enforcing a law "related to a price, route, or service of an air carrier." The court held that the federal statute extends to foreign air carriers, and that antitrust claims were "related" to a price of an air carrier. An appeal is pending in the U.S Court of Appeals for the Ninth Circuit (No. 08-56385).

Civil Actions – Surface Transportation

Med Life Emergency Services, Inc. v. Ouachita Parish Police Jury, et al., 986 So. 2d 192 (No. 43,340; La. Ct. App. June 4, 2008).

In this case, the municipal defendants enacted ordinances which granted a single private ambulance provider the sole license to provide ambulance services in their jurisdictions. The Louisiana Court of Appeals affirmed the denial of the complaint by the trial court. The court explained that the ordinances were within the defendants' delegated powers pursuant to La. Stat. § 33:4791.1, which specifically authorized them to displace competition in ambulance services and provide a monopoly public service, and further provided them immunity from antitrust law.

Carolina Buggy Tours, LLC v. Gay, et al., 2008-1 Trade Cases ¶ 76,198 (No. 06-3435; D.S.C. July 1, 2008).

In this case, the plaintiff alleged that two competitors had coordinated their bids for the two available licenses for providing horse-drawn carriage rides in the City of Beaufort, South Carolina, in violation of § 1 of the Sherman Act (15 U.S.C. § 1) as well as the Clayton Act and state law. The U.S. District Court for South Carolina held that a newspaper article which

asserted that the competitors had coordinated their bids was hearsay and not admissible as evidence, and that in the absence of any other evidence the defendants were entitled to summary judgment.

Shames v. The Hertz Corporation, et al., 2008-2 Trade Cases ¶ 76,370 (No. 07-2174; S.D.Calif. July 24, 2008).

In this case, the plaintiff alleged that seven rental car companies had conspired with the California Travel and Tourism Commission ("CTTC") to pass on to consumers an assessment paid to the CTTC and airport concession fees, in violation of § 1 of the Sherman Act (15 U.S.C. § 1) and state law. The U.S. District Court for the Southern District of California held that the plaintiffs had plead sufficient facts, pursuant to the Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), to survive a motion to dismiss. The court observed that plaintiffs had asserted specific facts about an agreement to pass on CTTC assessments, and although the allegations regarding the airport concession fees were weaker, they also would be allowed to proceed. However, the court dismissed the claims against the CTTC on the grounds that it was a state instrumentality and thus protected by the state action immunity doctrine, and in a separate opinion (2008-2 Trade Cases ¶ 76,371 (September 24, 2008)) granted a final judgment to the CTTC. An appeal is pending in the U.S Court of Appeals for the Ninth Circuit (No. 08-56750).

In re Rail Freight Fuel Surcharge Litigation, 2008-2 Trade Cases ¶ 76,366 (No. 07-489; D.D.C. November 7, 2008).

In this case, the plaintiff alleged that four major railroads had conspired to raise their fuel surcharges in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the District of Columbia held that the plaintiffs had plead sufficient facts, pursuant to the Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), to survive a motion to dismiss. The court observed that the plaintiffs had alleged more than mere parallelism, and had asserted sufficient facts about the purported fuel surcharge conspiracy to move their claims "across the line from conceivable to plausible." In a separate opinion (2009-1 Trade Cases ¶ 76,459 (December 31, 2008)), regarding claims by indirect purchasers, the court held that claims under state antitrust laws were preempted by the Interstate Commerce Commission Termination Act (49 U.S.C. § 10101, et seq.) but that indirect purchasers did have standing to maintain a claim for an injunction under federal law.

Civil Actions – Ocean Transportation

Menkes v. St. Lawrence Seaway Pilots Association, 269 Fed.Appx. 54, 2008-1 Trade Cases ¶ 76,070 (No. 07-373; 2d Cir. March 12, 2008).

In this case, the plaintiff alleged that the SLPSA had attempted to monopolize the ship pilotage business in violation of § 1 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. Court of Appeals for the Second Circuit affirmed the dismissal of the complaint by the trial court, explaining that the plaintiff had not sustained an antitrust injury. The plaintiff did not seek to compete with the SLPSA but rather to work through its pilot pool as a non-member, and did not establish that his

inability to work through the SLSPA as a non-member pilot harmed competition. The court also noted that pilotage services on the Great Lakes were pervasively regulated by the Coast Guard.

In re: Parcel Tanker Shipping Services Antitrust Litigation, 541 F. Supp. 2d 487, 2008-1 Trade Cases ¶ 76,080 (No. 03-1568; D.Conn March 12, 2008).

In this case, the plaintiff alleged that competitors had engaged in predatory pricing for chemical parcel tanking shipping services in the Caribbean, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the District of Connecticut dismissed the claims on the ground that the plaintiff had failed to plead sufficient facts, pursuant to the Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). The plaintiff made general allegations of conspiracy without reference to any specific actions by the defendants. Further, although the defendants in another case had pleaded guilty to criminal conspiracy charges, those charges involved conduct in a different market, as well as a conspiracy to raise prices instead of to lower prices as predatory conduct.

U.S. Department of Justice

In 2007, Qantas Airways agreed to plead guilty and pay a $61 million fine on the basis of its participation in a conspiracy to fix the price of cargo flights. In *U.S. v. Qantas Airways Ltd.*, 530 F.Supp.2d 136, 2008-1 Trade Cases ¶ 76,034 (No. 07-567; D.D.C. January 9, 2008), the U.S. District Court for the District of Columbia held that two of the Qantas employees who had been "carved-out" from the immunity provided for by the agreement were not entitled to the redaction of their names, since their identification did not amount to an accusation that they were co-conspirators. Subsequently, an employee of Qantas agreed to plead guilty and serve 8 months in jail and pay a $20,000 fine, an employee of SAS agreed to plead guilty and serve 6 months in jail, an employee of British Airways agreed to plead guilty and serve 8 months in jail and pay a $20,000 fine.

In 2008, six additional air carriers (Air France, Cathay Pacific Airways, Japan Airlines, KLM Royal Dutch Airlines, Martinair, and SAS) agreed to plead guilty and pay fines ranging from $42 million to $350 million on the basis of their participation in a conspiracy to fix the price of cargo flights.

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On January 30, 2008, the U.S. Department of Justice ("U.S. DOJ") announced that it had closed its investigation into the acquisition of Midwest Air Group by an investment group led by TPG Capital, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a). U.S. DOJ's concern was triggered by the inclusion of Northwest Airlines in the investment group.

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On October 1, 2008, the U.S. DOJ announced that four executives of shipping companies had agreed to plead guilty, serve jail sentences, and each pay a $20,000 fine for participating in a conspiracy to rig bids, fix prices, and allocate market share for the ocean transportation of goods

between the continental U.S. and Puerto Rico. An additional executive agreed to plead guilty to charges that he destroyed documents that were material to the investigation.

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On October 29, 2008, the U.S. DOJ announced that it had closed its investigation into the merger of Northwest Airlines Corp. and Delta Air Lines, Inc. U.S. DOJ stated that the merger was likely to benefit U.S. consumers and not likely to substantially lessen competition.

U.S. Department of Transportation

On May 22, 2008, the U.S. Department of Transportation ("U.S. DOT") approved an application pursuant to 49 U.S.C. §§ 41308 and 41309 to in effect merge the antitrust immunity that the U.S. DOT previously had granted to two groupings of air carriers. The U.S. DOT previously had separately immunized KLM Royal Dutch Airlines and Northwest Airlines (informally known as the "Wings" alliance), and Air France, Alitalia, Czech Airlines, and Delta Air Lines (members of the SkyTeam alliance). The DOT concluded that the expansion of the immunized grouping, subject to certain conditions, would be in the public interest and would not reduce or eliminate competition (docket DOT-OST-2007-28644).

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On June 16, 2008, the U.S. DOT dismissed, at the applicants' request, an antitrust immunity application (49 U.S.C. §§ 41308 and 41309) that had been filed by the oneworld alliance carriers American Airlines, Finnair, Iberia, Malev Hungarian Airlines, and Royal Jordanian Airlines (docket DOT-OST-2007-28845). A new application subsequently was filed on August 15, 2008 by American, British Airways, Finnair, Iberia, and Royal Jordanian (docket DOT-OST-2008-0252), which remained pending as of the end of 2008.

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On July 23, 2008, an antitrust immunity application (49 U.S.C. §§ 41308 and 41309) was filed to add Continental Airlines to the existing grouping of the Star alliance carriers Air Canada, Austrian Airlines, BMI British Midland, LOT Polish Airlines, Lufthansa, SAS, Swiss International Air Lines, TAP Air Portugal, and United Airlines (docket DOT-OST-2008-02340). As of the end of 2008, the application remained pending.