Transportation Antitrust Cases (2012)

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This report summarizes reported antitrust decisions in 2012 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2012 that included antitrust related transportation decisions for 2011.

Civil Actions – Air Transportation

Dominguez v. UAL Corporation, 666 F.3d 1359, 2012-1 Trade Cases ¶ 77,773 (No. 10-7138, D.C.Cir. January 27, 2012).

Plaintiff alleged that United Air Lines ('United") had violated §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2) by prohibiting the resale of its tickets. The U.S. Court of Appeals for the District of Columbia Circuit affirmed a judgment in United's favor by the U.S. District Court for the District of Columbia, but on different grounds. The district court held that no antitrust violation had occurred, without considering whether the plaintiff had standing. The appeals court stated that the district court first should have considered his standing, even if it was clear that his claim would not succeed on its merits. The appeals court concluded that the plaintiff did not have standing, noting that he had failed to establish that a secondary market was likely to emerge, or that even if it did, United's pricing strategy would remain unchanged and that lower prices would have been available through the secondary market for his specific itinerary.

Diaz Aviation Corporation v. Puerto Rico Ports Authority, 2012 WL 706119 (No. 09-1583, D.P.R. March 5, 2012).

Plaintiff alleged that the defendants had violated §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2) by conspiring to prevent it from selling fuel to military aircraft at the San Juan airport. After trial, the U.S. District Court for the District of Puerto Rico held that Diaz had failed to meet its burden against the remaining defendants, a competing vendor, Airport Aviation Corp., and two of its employees (certain defendants – including the ports authority – were dismissed before trial). The court noted that Airport Aviation had a contract with the military and had not interfered with Diaz's operations, either on its own or in concert with another party. Airport Aviation had informed aircraft captains of its contract, but each captain made his own decision which fuel vendor to use – Airport Aviation, Diaz, or seven other vendors at the

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airport. Further, to the extent that the ports authority had taken various actions against Diaz, they were grounded on safety or security concerns, and in any case were not chargeable to the private defendants. An appeal has been filed (1st Cir. No. 12-1859).

JetAway Aviation, LLC v. County of Montrose, Colorado, 2012 WL 1044304, 2012-1 Trade Cases ¶ 77,855 (No. 07-2563, D.Colo. March 28, 2012).

Plaintiff alleged that the defendants, including both public and private entities, had violated §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2) by rigging the process for selecting a fixed based operator ("FBO") at Montrose County Airport. The U.S. District Court for the District of Colorado held that even if Montrose County had favored another contender, JetAway had failed to submit sufficient evidence that there had been an injury to competition. The plaintiff's expert alleged that the airport in the long-term could support only one FBO; in response, the court explained that antitrust law does not criminalize the protection of one monopolist from another seeking to replace it. The court also dismissed the antitrust claims brought against individuals, on the basis of the Local Government Antitrust Act (15 U.S.C. §§ 34-36) for a government official, and the Noerr-Pennington doctrine for others. An appeal has been filed (10th Cir. Nos. 12-1173 and 12-1194).

DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 871 F.Supp.2d 143, 2012-1 Trade Cases ¶ 77,897 (No. 11-564, E.D.N.Y. May 18, 2012).

Plaintiff alleged that the defendant airline was part of a conspiracy to fix the price of air cargo shipments, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Eastern District of New York denied United's motion to dismiss the claim. First, the court held that the claims were timely, because the filing of a separate class action tolled the claims against United until the date that an amended complaint dropping United as a defendant was filed. Second, the court held that the claims were not discharged by United's bankruptcy reorganization in 2006 because United had not disclosed the existence of such claims. Third, the Plaintiff had alleged sufficient facts to state a claim, because specific participation in the cartel had been alleged. An appeal has been filed (2nd Cir. Nos. 12-3192 and 12-4867).

Skyline Travel, Inc. v. Emirates, 476 Fed. Appx. 480, 2012-1 Trade Cases ¶ 77,915 (No. 11-1631, 2nd Cir. June 6, 2012).

Plaintiff, a travel agent, alleged that the defendant airline violated unspecified sections of the Sherman Act, Clayton Act, and New York antitrust law. The U.S. Court of Appeals for the Second Circuit affirmed the judgment of the U.S. District Court for the Southern District of New York that Skyline had failed to adequately identify a relevant market. The plaintiff has defined the market as "passenger air transportation and related services for New Jersey residents of Indian or Pakistani ethnicity who desired to fly on Emirates between JFK airport in New York, New York and various cities in India and Pakistan, especially in one-stop flights." The court stated that as a general matter, antitrust complaints which limited the market definition to a single brand and ignored potential substitutes should be dismissed.

U.S. v. Florida West International Airways, Inc., 2012-2 Trade Cases ¶ 77,993, ¶ 77,994 (No. 10-10864, S.D.Fla. July 20, 2012).

The U.S. had charged the defendant with participating in a conspiracy to fix surcharges for air cargo; Florida West requested permission to enter a *nolo contendre* plea, which the U.S opposed. Although *nolo* pleas are rare in antitrust cases, the U.S. District Court for the Southern District of Florida held that it was justified by the unusual circumstances of the case, which included that the primary Florida West employee who participated in the conspiracy was immune from prosecution because he was a secret executive of a competing carrier that had received immunity. Additionally, the court stated that the *nolo* plea was unlikely to have any consequences for civil actions, because none were pending and the statute of limitations for bringing such an action likely had passed. Subsequently, the court imposed a $1 million fine.

Superior Offshore Int'l, Inc. v. Bristow Group, Inc., 2012 WL 3055849, 2012-2 Trade Cases ¶ 77,992 (No. 11-3010, 3rd Cir. July 27, 2012).

Plaintiff alleged price fixing by providers of helicopter services to the offshore oil and gas industries in the Gulf of Mexico, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. Court of Appeals for the Third Circuit affirmed the judgment of the U.S. District Court for the Eastern District of Pennsylvania that there was insufficient evidence of parallel conduct to survive summary judgment, because the price increases could just as easily have been the result of independent analysis by the defendants. The two pieces of evidence offered – an overheard conversation between competitors and an unidentified helicopter operator's ambiguous remark about price fixing – had been correctly deemed too vague to carry the plaintiff's burden.

Precision Associates, Inc. v. Panalapina World Transport (Holding) Ltd., 2012 WL 3307486, 2012-2 Trade Cases ¶ 78,154 (No. 08-0042. E.D.N.Y. August 13, 2012).

Plaintiffs alleged that the defendant freight forwarders had engaged in multiple conspiracies to fix air cargo surcharges, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Eastern District of New York adopted a magistrate's report and recommendation which concluded that plaintiffs had failed to meet basic pleading requirements, including that they actually paid the surcharges, or that most of the defendants participated in the conspiracy. However, the court upheld certain claims; e.g., some – but not all – of the multiple conspiracies were held to be plausible. Certain other defenses – such as that the claims were prohibited by the Foreign Trade Antitrust Improvements Act (15 U.S.C. § 6a) also were denied. Additionally, plaintiffs were given an opportunity to replead their claims.

American Airlines, Inc. v. Travelport Limited, Slip Opinion Granting Motion to Dismiss (No. 11-244, N.D.Tex. August 16, 2012).

American Airlines, Inc. ("American") asserted that two distribution systems, Travelport and Sabre, and a ticket agent, Orbitz, had sought to monopolize the distribution of airline flight, fare, and availability information, in violation of §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. District Court for the Northern District of Texas dismissed a counterclaim filed by Travelport against American, which alleged that American had sought to monopolize air travel in certain city-pair markets; the court held that Travelport was neither a competitor nor a consumer of American's services, and thus had not suffered any antitrust injury. Subsequently, the court unsealed an order that denied motions to dismiss filed by the defendants, finding that American had stated plausible antitrust claims. See 2012 WL 3737037, 2012-2 Trade Cases ¶ 78,026 (No. 11-244, N.D.Tex. August 7, 2012, unsealed August 28, 2012).

American Airlines, Inc. v. Sabre, Inc., 694 F.3d 539, 2012-2 Trade Cases ¶ 78,038 (No. 11-10759, 5th Cir. September 5, 2012).

Sabre previously had sought to remove a case brought against it by American in Texas state court to federal court; the court concluded that removal was not warranted, remanded the case, and assessed attorney fees against Sabre. The U.S. Court of Appeals for the Fifth Circuit affirmed the fee ruling by the U.S. District Court for the Northern District of Texas. Sabre had argued that it had reasonable grounds to believe that removal was proper. But the court held that the requirement that Texas state antitrust law be construed "in harmony with federal judicial interpretations of comparable federal antitrust statutes" did not raise a federal issue that would justify removal.

In re Air Cargo Shipping Services Antitrust Litigation, 697 F.3d 154, 2012-2 Trade Cases ¶ 78,083 (No. 11-5464, 2d Cir. October 11, 2012).

The plaintiffs asserted that the defendant foreign airlines had conspired to fix cargo prices in violation of various states' antitrust laws. The U.S. Court of Appeals for the Second Circuit affirmed the decision of the U.S. District Court for the Eastern District of New York that the claims were preempted by the Federal Aviation Act (49 U.S.C. § 41713(b)(1)). The dispositive question on appeal was whether the statute at issue extended preemption to foreign airlines, because the statutory text referred only to "an air carrier."

The court concluded that in context, the language should not be understood to refer only to U.S.-flag airlines but also to foreign airlines, and thus the plaintiffs' claims could not be maintained, because the statute prohibited state law-based claims "related to a price, route, or service" of the foreign airline defendants.

Solent Freight Services, Ltd. v. Alberty, ___ F.Supp.2d ___, 2012-2 Trade Cases ¶ 78,190 (No. 11-4375 E.D.N.Y. December 18, 2012).

The plaintiff, a freight forwarder, alleged that an exclusive dealing arrangement between an egg hatchery and a competing freight forwarder §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. District Court for the Eastern District of New York held that the plaintiff lacked standing to bring an antitrust claim, because it would not be directly injured by such an arrangement; the court noted that a more appropriate plaintiff would be a purchaser of eggs, that was required to use the competitor's forwarding services. The court also noted that any agreement was a vertical restraint and thus was not a *per se* violation of the Sherman Act, as well as that Solent had not plead sufficient facts to show harm to the market for the forwarding of eggs, and thus its claims also failed under a rule of reason analysis.

Civil Actions – Surface Transportation

Continental Guest Services Corp. v. International Bus Services, Inc., 939 N.Y.S.2d 30 (N.Y. Supreme Ct., App. Div. February 23, 2012).

Plaintiff, which operated hotel concierge desks, alleged that the defendant, a sightseeing tour bus company and the product of a recent merger between two competitors, had attempted to monopolize both the local market for tour buses and – by reducing its commissions – the distribution channel for its ticket sales. On appeal, the Appellate Division of the New York Supreme Court affirmed the trial court's decision to dismiss both claims. In regard to the tour bus market, the court explained that the plaintiff lacked standing, because it was neither a consumer nor a competitor of the defendant's bus tours. In regard to the ticket sales market, the court stated that plaintiff had failed to establish that hotel concierge desks were a separate market for tour bus tickets, separate from sales through street vendors, the Internet, and visitors centers. The court also noted that even if hotel concierge desks were a relevant product market, a defendant's vertical control of how its product is distributed is presumptively legal.

Dumas Towing, LLC v. DeArmond, 2012 WL 620332 (No. 11-121, N.D.Tex. February 24, 2012).

Plaintiff alleged that the defendant, the sheriff of Moore County, had violated § 1 of the Sherman Act (15 U.S.C. § 1) and § 4 of the Clayton Act (15 U.S.C. §15) by excluding Dumas from the list of towing companies used by the local government for non-consent tows. U.S. District Court for the Northern District of Texas held that the plaintiff had presented no evidence that the sheriff had conspired with another party; a bare allegation, unsupported by evidence, that the sheriff was a friend of the owner of another towing company was insufficient. Additionally, the court noted that the Clayton Act did not permit a claim for damages against a local government official.

In Re: Rail Freight Surcharge Antitrust Litigation, 2012 WL 2366165, 2012-1 Trade Cases ¶ 77,945 (No. 07-489, D.D.C. June 21, 2012).

Plaintiffs alleged that the three defendant railroads had conspired to fix prices for rail freight transportation services through 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 granted class certification for the claims, for the period July 1, 2003 through December 31, 2008. The court held that the Plaintiffs met the requirements of Rule 23 of the Federal Rules of Civil Procedure, including that they had adequately alleged a horizontal price-fixing conspiracy and antitrust injury in the form of overcharges paid due to that conspiracy. An appeal has been filed (D.C. Cir. No. 12-7085); in the interim, the district court declined to stay discovery and summary judgment proceedings, but did stay class notice proceedings. See 286 F.R.D. 88 (September 20, 2012).

Liu v. Americo, 677 F.3d 489, 2012-1 Trade Cases ¶ 77,919 (No. 11-2053, 1st Cir. June 21, 2012).

Plaintiff alleged that the defendant – a subsidiary of U-Haul International, Inc. – had attempted to fix prices for one-way truck rentals. The U.S. District Court for the District of Massachusetts held that the plaintiff could bring a claim based on state consumer protection law (Mass. Gen Laws. Ch. 93A), even though U-Haul had not actually succeeded in fixing prices. Although § 1 of the Sherman Act (15 U.S.C. § 1) does not condemn a mere unilateral solicitation or attempt to conspire, the Massachusetts statute at issue instead parallels § 5 of the FTC Act (15 U.S.C. § 45), which does condemn unilateral acts, because a proposal to engage in horizontal price-fixing is itself dangerous; and the FTC in 2010 had entered into a consent order with U-Haul, based on § 5 of the FTC Act.

Shames v. Hertz Corporation, 2012 WL 5392159, 2012-2 Trade Cases ¶ 78,120 (No. 07-2174, S.D.Calif. November 5, 2012).

Plaintiffs alleged that the California Travel and Tourism Commission had violated § 1 of the Sherman Act (15 U.S.C. § 1) by conspiring with rental car companies to uniformly pass-through to consumers a 2.5% tourism fee, which funded the commission, as well as to "unbundle" existing airport concession fees, which traditionally amounted to about 9% of rental prices. After the U.S. Court of Appeals for the Ninth Circuit held that antitrust claims could be maintained against the commission, the parties entered into a settlement agreement, which the court approved. Class members can choose to receive a cash payment of $2 per rental day with a $5 minimum payout, or a voucher for 1-2 free rental days, depending on how many rental days they accumulated during the class period. Counsel were awarded $5.9 million in fees and costs. An appeal has been filed (9th Cir. Nos. 12-57205, 12-57206, 12-57211, and 12-57247).

Association of Taxicab Operators, USA v. Yellow Checker Cab Company of Dallas/Fort Worth, Inc., ___ F.Supp. ____, 2012-2 Trade Cases ¶ 78,163 (No. 10-1638. N.D.Tex. November 28, 2012).

Plaintiffs alleged that companies authorized to operate taxi fleets violated §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2) and § 7 of the Clayton Act (15 U.S.C. § 18) by agreeing with corporate affiliates which operated taxis under other brands to charge "stand fees" to drivers that were below their average operational costs. The U.S. District Court for the Northern District of Texas held that the § 1 claim should be dismissed because the defendants were incapable of illegally conspiring with sister companies; that the § 2 claim should be dismissed because the plaintiffs had provided no proof that the defendants had specific intent to monopolize; and that the § 7 claim should be dismissed because it required proof of antitrust injury, which had not been shown under §§ 1-2. However, to the extent one defendant argued state-action immunity, the court held that the claims against it should not be dismissed, because the alleged restraints on competition were not pursuant to a clearly articulated state policy.

Civil Actions – Ocean Transportation

Krause Marine Towing Corp. v. Association of Maryland Pilots, 944 A.3d 1043 (Md. Ct. Spec. App. May 31, 2012).

A ship-docking tug company claimed that the work rules of the state pilots association violated state antitrust law (Md. Comm. Law § 11-202, et seq.) by unreasonably restraining competition for tug business at the Port of Baltimore. The Maryland Court of Special Appeals affirmed the trial court's judgment in favor of the defendants. The court held that the association's rotation schedule for docking masters – which prevented ship lines and docking masters from entering into direct agreements – was not an unreasonable restraint. Applying the rule of reason analysis, the court concluded that the rotation schedule – along with statutory prohibition on conflicts of interest – was intended to protect the independence of judgment afforded to docking masters; there was no evidence of any anti-competitive intent.

Federal Trade Commission

On November 15, 2012, the FTC announced that it had entered into an agreement with Hertz Global Holdings, Inc and Dollar Thrifty Automotive Group, Inc.; Hertz agreed to divest itself of certain assets in connection with its $2.3 billion acquisition of Dollar Thrifty, including Hertz's Advantage Rent A Car subsidiary and the rights to operate 29 Dollar Thrifty on-airport locations.

Department of Justice

On January 27, 2012, the U.S. Department of Justice ("DOJ") announced that the former owner/operator of a Florida airline services company had pleaded guilty to charges of wire fraud, in connection with a scheme to defraud Ryan International Airlines by making kickback payments to a procurement official at Ryan. Although the defendant was not charged with antitrust violations, DOJ stated that the case had arisen out of an investigation of anticompetitive conduct in the airline charter services industry. Previously, four other individuals pleaded guilty to participation in the same scheme.

On April 30, 2012, DOJ announced that two school bus service providers – National Express Corporation and Petermann Partners, Inc. – had agreed to divest certain school bus contracts and assets in Texas and Washington in order to proceed with their proposed merger. The contracts and assets primarily would be sold to Student Transportation of America, Inc. See also State of Washington v. National Express Group PLC, 2012 WL 3017887, 2012-1 Trade Cases ¶ 77,899 (No. 12-757, D.D.C. May 10, 2012).

On August 1, 2012, DOJ announced that Crowley Liner Services, Inc. had pleaded guilty to participating in a conspiracy to fix rates for the transportation of cargo by ship between the continental U.S. and Puerto Rico, and to pay a $17 million fine. Two other companies and five individuals previous pleaded guilty to participating in the conspiracy, and an additional individual is scheduled to stand trial in 2013.

On September 19, 2012, DOJ announced that Yamato Global Logistics Japan Co. Ltd., a Japanese freight forwarder, had agreed to plead guilty and pay a fine totaling $2.3 million due to their participation in a conspiracy to fix certain fees – including fuel surcharges and security fees – for the transportation of freight by air between Japan and the U.S. from September 2002 until at least November 2007. DOJ noted that thirteen other freight forwarders had plead guilty and paid fines exceeding $100 million for their participation in various conspiracies to fix fees for air freight destined to the U.S.

On November 15, 2012, DOJ announced that it had entered into an agreement with Star Atlantic Waste Holdings, L.P. and Veolia ES Solid Waste, Inc.; Star Atlantic agreed to divest itself of certain waste collection or disposal assets in connection with its $1.9 billion acquisition of Veolia, including transfer stations in New Jersey and Georgia and commercial waste collection routes in Georgia.

Surface Transportation Board

Stagecoach Group PLC and Coach USA, Inc., et al. – Acquisition of Control – Twin America, LLC, STB Docket No. MC-F 21035, served January 11, 2012.

In this decision, the Surface Transportation Board ("STB") denied a request for reconsideration of an earlier decision to not approve the acquisition of one New York City bus sightseeing company of another New York City bus sightseeing company. Under 49 U.S.C. § 14303, certain transactions involving motor carriers of passengers requires approval from the STB and such approval carries with it a statutory immunity from the antitrust laws. Note: Following on this decision, on December 11, 2012 the Antitrust Division of the U.S. Department of Justice and the Antitrust Bureau of the Office of the Attorney General of the State of New York jointly initiated a civil action in the U.S. District Court for the Southern District of New York (No. 12-8989) alleging that the bus companies violated Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 7 of the Clayton Act (15 U.S.C. § 18).

[1] This report is submitted as a report of the Antitrust Committee, Andrew M. Danas, Grove, Jaskiewicz & Colbert, Washington DC, and Michael Spurlock, Beery & Spurlock Co., LPA, Columbus, Ohio, Co-Chairs.

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