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# Transportation Antitrust Cases, 2015

This report summarizes reported antitrust decisions in 2015 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2015 that included antitrust related transportation decisions for 2014.

***Civil Actions – Air Transportation***

US Airways, Inc. v. Sabre Holdings Corporation, 105 F.Supp.3d 265, 2015-2 Trade Cases ¶ 79,398 (S.D.N.Y. no. 11-2725, January 6, 2015).

In this case, US Airways sought treble damages from Sabre and affiliated entities on the basis that they had charged inflated booking fees and conspired with competitors to prevent US Airways from distributing its tickets at lower cost, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). In a redacted opinion, the court narrowed the timeframe for which US Airways could seek damages to February 23, 2011 through October 30, 2012, based on agreements between the parties. The court also dismissed some but not all of the claims on substantive grounds – such as claims grounded in Sabre's alleged refusal to distribute a new product, "Choice Seats," for US Airways, and in a separate agreement with the travel agent Travelocity – leaving claims against Sabre for asserted overcharges between $45 million and $73 million, before trebling. Subsequently, US Airways waived its right to damages in order to obtain a bench trial on its claims, but then was allowed to reverse itself and again seek damages before a jury (2015 WL 8335119, 2015-2 Trade Cases ¶ 79,401, December 8, 2015).

Planetarium Travel, Inc. v. Altour International, Inc., 97 F.Supp.3d 424 (S.D.N.Y. no. 13-8538, March 16, 2015).

In this case, Planetarium Travel alleged that Altour International's exclusive arrangement to provide discounted first and business class airline tickets to American Express violated § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Southern District of New York granted Altour's motion to dismiss the case, explaining that the market definition urged by Planetarium was legally insufficient; i.e., Planetarium had failed to establish that AmEx customers and dis-

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counted first/business-class tickets comprised distinct markets. The court also noted other reasons that the claim should be dismissed, including that Planetarium had failed to show that the Altour-AmEx arrangement actually was exclusive, nor had Planetarium otherwise overcome the presumption that an exclusive dealing arrangement between a distributor and a supplier is lawful.

In Re: AMR Corporation, 527 B.R. 874, 2015-1 Trade Cases ¶ 79,130 (Bankr.S.D.N.Y. nos. 11-15463 and 13-01392, March 31, 2015).

In this case, the plaintiffs challenging the already-consummated merger between American Airlines and US Airways sought to amend and supplement their complaint to assert treble damages. The U.S. Bankruptcy Court for the Southern District of New York denied the motion, holding that the plaintiffs had failed to state a claim under § 4 of the Clayton Act (15 U.S.C. § 15). First, the amended complaint was held not to state a plausible market; the plaintiffs alleged a national market, but case law recognized that city-pairs were the appropriate way to define markets for antitrust purposes in the airline industry. Second, many of the allegations of harm failed to establish a chain of causation to the merger; some even occurred before the merger. Third, the plaintiffs were held to lack standing because they sought damages as travel agents rather than as consumers, and thus would not be efficient enforcers of the antitrust laws.

Schenker, AG v. Societe Air France, 102 F.Supp.3d 418, 2015-1 Trade Cases ¶ 79,144 (E.D.N.Y. no. 14-4711, April 23, 2015).

In this case, the plaintiff – a freight forwarder – alleged fraudulent concealment tolled the statute of limitations for its price-fixing claims under § 1 of the Sherman Act (15 U.S.C. § 1) and § 4 and § 16 of the Clayton Act (15 U.S.C. § 15 and § 26), and thus was not subject to dismissal. The U.S. District Court for the Eastern District of New York held that the plaintiff sufficiently alleged that the air carrier had concealed its involvement in the conspiracy until a date after raids that the U.S. Department of Justice conducted against other air carriers, including that the air carrier had taken affirmative acts to conceal the conspiracy and that the plaintiff did not have access to the financial information necessary to uncover artificially inflated prices.

In Re: Air Cargo Shipping Services Litigation, 2015 WL 5093503, 2015-2 Trade Cases ¶ 79,237 (E.D.N.Y. no. 06-1775, July 10, 2015).

In this case, the plaintiffs – freight forwarders – alleged a conspiracy among air carriers to fix fuel and security 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 held – adopting an earlier recommendation of a magistrate judge – that a class should be certified, finding that the requirements of Federal Rule of Civil Procedure 23 had been satisfied. At the same time, the court also found that certain proposed expert testimony should be excluded, based on the Daubert standard.

In Re: Delta/AirTran Baggage Fees Litigation, 2015 WL 5258757, 2015-2 Trade Cases ¶ 79,259 (N.D.Ga. no. 09-2089, August 5, 2015).

In this case, the plaintiffs alleged that Delta Air Lines and AirTran Airways had conspired to fix their fees for checked baggage, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Northern District of Georgia granted a motion to certify a class, finding that common issues predominated over individual issues pursuant to Federal Rule of Civil Procedure 23, even though individualized proof of damages would be required. Separately, the court sanctioned Delta $2.7 million for discovery violations (2015 WL 4635729, 2015-2 Trade Cases ¶ 79,258, August 3, 2015).

In Re: Domestic Airline Travel Antitrust Litigation, 2015 WL 6081241, 2015-2 Trade Cases ¶ 79,335 (J.P.M.L. no. 2656, October 13, 2015).

In this case, the plaintiffs in at least 23 cases alleged that the four largest domestic airlines had conspired to limit capacity and prop up fares in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The Judicial

Panel on Multidistrict Litigation held that the cases should be consolidated in the U.S. District Court for the District of Columbia, as a convenient and accessible forum for nationwide litigation.

***Civil Actions – Surface Transportation***

Schwartz d/b/a Rent a Wreck v. Rent a Wreck of America, Inc., 603 Fed. Appx. 142, 2015-1 Trade Cases ¶ 79,101 (4th Cir. no. 13-2189, March 10, 2015).

In this case, a car rental franchisor alleged that his contractual right to operate Rent-A-Wreck franchises in West Los Angeles was valid, while the franchisor counterclaimed that the contract was invalid under California competition law (Cal. Bus. & Prof. Code § 16600). The franchisor appealed a district court decision in favor of the franchisee. The U.S. Court of Appeals for the Fourth Circuit affirmed, explaining that the burden of proof to show that the contract violated California law correctly had been assigned to the franchisor, as well as that the district court had been correct to reject a market definition limited to Rent A Wreck franchises, and noting that the franchisor subsequently had not tried to narrow the market definition from rental cars generally to older rental cars.

Plaza 22, LLC v. Waste Management of Louisiana, LLC, 2015 WL 1120320, 2015-1 Trade Cases ¶ 79,103 (M.D.La. no. 13-618, March 12, 2015).

In this case, customers of a waste disposal company alleged that they had overpaid for the defendant's small container-hauling services based on exclusionary conduct prohibited by Louisiana antitrust law (L.R.S. § 51:122 and § 51:123). The U.S. District Court for the Middle District of Louisiana denied the certification of a class, explaining that a series of mini-trials would be necessary to determine the nature and amount of each class member's damages, as well as that Plaza 22's claims were not typical of the class based on factors such as the limited time period in which it contracted with Waste Management.

AFMS, LLC v. United Parcel Service Co., 105 F.Supp.3d 1061, 2015-1 Trade Cases ¶ 79,202 (C.D.Calif. no. 10-5830, April 30, 2015).

In this case, a logistics consultant alleged that two major carriers had violated § 1 of the Sherman Act (15 U.S.C. § 1) by adopting policies of negotiating directly with customers instead of through third-party consultants. The U.S. District Court for the Central District of California granted the defendants' motion to dismiss, explaining that AFMS had failed to provide evidence of a legally cognizable market for "shipping consultation services." The court also held that AFMS had failed to show that the carriers had committed per se violations of the Sherman Act that would excuse it from defining a market; the court explained that the per se rule can be invoked only if a court has considerable experience with a restraint and can predict that the restraint would almost always be invalid under the rule of reason.

Robbins v. Becker, 794 F.3d 988, 2015-2 Trade Cases ¶ 79,243 (8th Cir. no. 14-1435, July 27, 2015).

In this case, the plaintiff alleged that officers of the Missouri State Highway Patrol had conspired with the plaintiff's competitors to exclude it from a rotating list of towing companies eligible to assist disabled vehicles on highways, in violation of §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal of the antitrust claims against the officers by the U.S. District Court for the Eastern District of Missouri, finding that the plaintiff had offered no direct or circumstantial evidence of their participation in such a conspiracy.

Yellow Cab Co. v. Uber Technologies, Inc., 2015 WL 4987653 (D.Md. no. 14-2764, August 19, 2015).

In this case, a taxi company alleged that Uber's transportation services violated Maryland statutes and common law, including price-fixing and attempted monopolization in violation of state antitrust law (Md. Com. Law § 11-204). Uber removed the case to federal court, but the U.S. District Court for the District of Maryland held that the case should be remanded to state court, because the plaintiffs had asserted only state law claims and diversity was lacking. The court further noted that Uber had failed to show that the non-diverse parties named in the antitrust and other claims were not real and substantial parties and should be disregarded.

United States v. Twin America, LLC, 2015-2 Trade Cases ¶ 79,361 (S.D.N.Y. no. 12-8989, November 17, 2015).

In this case, the defendant tour bus companies entered into a consent decree to settle claims that their joint venture – between the only two meaningful competitors in the hop-on/hop-off bus tour market – violated § 1 of the Sherman Act (15 U.S.C. § 1), § 7 of the Clayton Act (15 U.S.C. § 18), and § 340 of the New York Donnelly Act (N.Y. Gen. Bus. Law § 340). The participants in the joint venture – Coach USA, Inc. and City Sights LLC – agreed to relinquish certain bus stop authorizations to the New York City Department of Transportation and to disgorge $7.5 million in profits.

United States v. Rivera-Hernández, 2015 WL 9272891, 2015-2 Trade Cases ¶ 79,412 (D.P.R. no. 15-361, December 18, 2015).

In this case, the defendants moved to dismiss charges that they conspired to rig bids for public school transportation contracts in violation of § 1 of the Sherman Act (15 U.S.C. § 1), on the ground that Puerto Rico is not a state and not within the scope of the statute. The U.S. District Court for the District of Puerto Rico denied the motion, holding that for purposes of the Sherman Act, precedent established that Puerto Rico should be deemed to be a state. The court also rejected the contention that the charges were insufficiently linked to interstate commerce, explaining that the alleged conspiracy was part of the "flow" thereof because it implicated federal funds and involved buses and gasoline that had been shipped in interstate commerce.

***Civil Actions – Rail Transportation***

VBR Tours, LLC v. National Railroad Passenger Corp., 2015 WL 225328, 2015-1 Trade Cases ¶ 79,027 (N.D.Ill. no. 14-804, January 15, 2015).

In this case, the plaintiff alleged that Amtrak's discontinuation of the payment of commissions to most travel agents and tour operator violated §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2) and the Illinois Antitrust Act (740 ILCS 10/3(3)). The U.S. District Court for the Northern District of Illinois granted Amtrak's motion to dismiss the claims, on the basis that VBR had failed to state an antitrust injury. The court concluded that the allegations did not allege an injury that the antitrust laws had been intended to prevent – e.g., to the extent that one travel agent continuing to receive commissions allegedly could use that advantage to undercut competitors on price, VBR had not suggested that predatory pricing would occur. Likewise, the court concluded that VBR's claim that it would increase its prices to make up for lost commissions – and thus consumers would be harmed – was implausible. A request for reconsideration – on the basis that the complaint instead alleged a refusal to deal and denial of an essential facility – subsequently was denied. 2015 WL 5693735, 2015-2 Trade Cases ¶ 79,327 (September 28, 2015).

Oxbow Carbon & Minerals, LLC v. Union Pacific Railroad Company, 81 F.Supp.3d 1, 2015-1 Trade Cases ¶ 79,087 (D.D.C. no. 11-1049, February 24, 2015).

In this case, the plaintiffs alleged that the defendant railroads had conspired to fix prices and allocate markets for the transportation of coal products, in violation of §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The defendants moved to dismiss the plaintiffs' amended complaint on the grounds that it failed to state a claim and for lack of standing. The U.S. District Court for the District of Columbia largely denied the motion. The court held that most of the parties did allege cognizable injuries, although two plaintiffs were not parties to any agreement which allowed them to state a breach of contract claim against the defendants. The court also held that the amended complaint sufficiently alleged a conspiracy to impose fuel surcharges on coal products and to allocate markets in the Western United States.

***Civil Actions – Ocean Transportation***

Precision Associates, Inc. v. Panalapina World Transport (Holding) Ltd., 2015 WL 4987751, 2015-2 Trade Cases ¶ 79,366 (E.D.N.Y. no. 08-0042, August 19, 2015).

In this case, various defendants were alleged to have participated in a conspiracy to fix prices for international ocean shipping services, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The so-called "DHL" defendants moved for an order dismissing the claims against them for purchases made after October 11, 2007, on the ground that they had ceased to participate in the conspiracy by that date. The U.S. District Court for the eastern District of New York granted the request, explaining that the complaint acknowledged that DHL had sought leniency from antitrust regulators in the U.S. and Europe in October 2007, and that constituted affirmative evidence of abandonment of the conspiracy. The court noted that one of the conditions of leniency was that DHL take prompt and effective action to terminate its part in the activity, and there were no plausible allegations of conspiratorial conduct after that date.

In Re: Vehicle Carrier Services Antitrust Litigation, 2015 WL 5095134, 2015-2 Trade Cases ¶ 79,276 (D.N.J. no. 13-3306, August 28, 2015).

In this case, the plaintiffs alleged a conspiracy among ocean shipping companies to fix the prices for the transportation of motor vehicles from foreign countries to the United States, in violation of § 1 of the Sherman Act (15 U.S.C. § 1), sections 4 and 16 of the Clayton Act (15 U.S.C. § 15 and § 26) and state antitrust laws. The U.S. District Court for the District of New Jersey held that the claims were preempted by the Shipping Act of 1984 (49 U.S.C. § 40301, et seq.), which provided that the claims were within the exclusive jurisdiction of the Federal Maritime Commission because they implicated agreements to reduce capacity, for which the Shipping Act of 1984 specifically prohibited private antitrust suits.

U.S. v. Peake, 804 F.3d 81, 2015-2 Trade Cases ¶ 79,339 (1st Cir. no. 14-1088, October 14, 2015).

A former executive of an ocean freight carrier appealed from his conviction of participation in a conspiracy to fix the prices for maritime freight services between Puerto Rico and the continental U.S. in violation of § 1 of the Sherman Act (15 U.S.C. § 1), for which he had been sentenced to 60 months in prison and a $25,000 fine. The U.S. Court of Appeals for the First Circuit affirmed the conviction despite Peake's various procedural challenges, such as that the court had incorrectly calculated the volume of commerce affected by the conspiracy and thus had improperly applied the U.S. Sentencing Guidelines. The court explained that the calculation should consider not just the damage caused by or profit made by the defendant, but the overall amount of sales made during the conspiracy.

***Department of Justice***

On January 30, 2015, DOJ announced that an executive of Kawasaki Kisen Kaisha, Ltd. ("K-Line") had pleaded guilty and been sentenced to 18 months in prison and to pay a $20,000 fine for his involvement in a conspiracy to fix prices for roll-on/roll-off ocean shipping services. Three corporations, including K-Line, previously had pleaded guilty. Another K-Line executive and a Nippon Yusen Kabuskiki Kaisha ("NYK") executive subsequently pleaded guilty and were sentenced to 14-15 months in prison and the same fines, and another K-Line executive and two other NYK executives were indicted.

On March 13, 2015, DOJ announced that it would require Waste Management, Inc. and Deffenbaugh Disposal, Inc. to divest certain small container commercial waste collection routes in Topeka, Kansas and Van Buren/Fort Smith/Springdale, Arkansas as a condition of Waste Management's acquisition of Deffenbaugh Disposal.

On March 16, 2015, DOJ announced that in coordination with the New York State Attorney General, it had required that Coach USA, Inc., City Sights, LLC, and their joint venture Twin America, LLC disgorge $7.5 million in profits as well as Manhattan bus stop authorizations that had been obtained through the coordination of sightseeing bus tours in violation of the antitrust laws. The defendants also had settled consumer class action claims for $19 million.

On May 8, 2015, a jury acquitted Thomas Farmer, a former Vice President of Crowley Liner Services, Inc., of conspiring to fix rates and surcharges for freight between the mainland U.S. and Puerto Rico in violation of § 1 of the Sherman Act (15 U.S.C. § 1). When he was indicted, DOJ noted that three companies and six individuals previously had agreed to plead guilty or were convicted at trial (D.P.R. 13-CR-00162).

On May 21, 2015, DOJ announced that five individuals had been indicted in Puerto Rico for rigging school bus transportation contracts in Caguas, Puerto Rico, in violation of § 1 of the Sherman Act (15 U.S.C. § 1) as well as statutes prohibiting mail fraud and conspiracy.

On September 16, 2015, DOJ announced that it would not challenge the acquisition of Orbitz by Expedia, concluding that the acquisition was not likely to substantially lessen competition or harm consumers so far as airline and car rental (as well as hotel) bookings were concerned.

On November 10, 2015, DOJ announced that it would challenge the proposed acquisition of 24 takeoff and landing slots, at Newark Liberty International Airport, by United Airlines from Delta Air Lines on the basis that the transaction would increase United's already dominant position at the airport.

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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