

# ZUCKERT SCOUTT & RASENBERGER, L.L.P.

## ATTORNEYS AT LAW

### Recent Activity – Antitrust/Transportation

#### Remarks of James A. Calderwood before the Transportation Lawyers Association Annual Meeting

May 14, 2011

##### Overview

In the last few years there has been a significant increase in the number of antitrust actions that have involved transportation entities. These have been instituted by the Department of Justice (DOJ), as well as private litigation. This report briefly examines some of these actions.

##### Motor Carriers

1. In 2007 a number of class actions were brought against various motor carriers alleging they fixed the rate of fuel surcharges. The actions were consolidated in the U.S.D.C. for the N.D. of Georgia. Eventually the class action was dismissed by the court relying primarily on a failure by the plaintiffs to meet the pleading standards in price fixing cases established by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Re LTL Shipping Services Antitrust Litigation*, 2009 U.S. Dist. LEXIS 14276 (2009).
2. In 2007 several class actions were instituted alleging that various household goods motor carriers had unlawfully agreed upon a uniform method for establishing a fuel surcharge. The actions were consolidated in the U.S.D.C. for the D. of South Carolina. In *Re Household Goods Movers Antitrust Litigation*, MDL Docket No. 1865. While an appeal was pending at the U.S. Court of Appeals for the Fourth Circuit a settlement was entered into on October 21, 2010.
3. In 2011 PODS Enterprises instituted an action against ABF Freight System alleging that PODS owned a U.S. Trademark Registration for the trademark PODS for metal containers used for the storage and transportation of certain types of cargo. PODS alleged that ABF used this trademark without permission. *PODS Enterprises, Inc. v. ABF Freight System, Inc.*, No. 8:11-CV-00084 (U.S.D.C. M.D. Florida). On March 25, 2011 ABF filed a counterclaim alleging that the plaintiff's attempt to enforce such a trademark constituted an attempt to monopolize in violation of Section 2 of the Sherman Act. The case is pending.



The firm's work on antitrust issues involves a broad range of business interests, with a particular emphasis on the transportation industries, including joint ventures, mergers (including the Department of Justice and Federal Trade Commission review process), and other forms of cooperative dealings. For further information regarding the matters covered in these prepared remarks, please contact:

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4. On October 10, 2010 AFMS, a parcel shipping consultant, filed an antitrust action in the U.S.D.C. for the C.D. of California against UPS, Inc. and FedEx Corporation alleging they had agreed to boycott AFMS in violation of the Sherman Act. AFMS LLC v. UPS & FedEx, CV10-5830. The case is pending.

### Logistics Companies

1. In September 2010 six freight forwarders agreed to plead guilty to engaging in conspiracies to fix a variety of prices related to international air cargo shipments. The six were EGL, Inc.; Kuehner & Nagel; Geologistics International Management; Panalpina World Transport; Schenker AG and BAX Global, Inc. DOJ has indicated that its investigation of forwarders is continuing and other forwarders have acknowledged that they are under investigation.

2. On January 3, 2008, a class action was filed in the U.S.D.C. for the E.D. of New York against nine forwarders and a trade association of forwarders alleging they had engaged in price fixing. Precision Associates, Inc. et al. v. Panalpina World Transport, et al., CV08-0042. The case is pending.

### Ocean Carriers

1. In 2008 DOJ initiated a grand jury investigation related to price fixing in ocean carriage to and from Puerto Rico and other locations. A number of class actions were also instituted against ocean carriers. On February 24, 2011, one carrier, Horizon, agreed to plead guilty to price fixing with respect to Puerto Rican service and was fined \$45 million, later reduced to \$15 million. Three executives of the carrier entered guilty pleas and received prison terms. A related class action against several carriers settled for a total of \$52.25 million.

2. Currently pending before the U.S. Court of Appeals for the Ninth Circuit is an appeal of the dismissal of an antitrust class action against two ocean carriers with respect to service between the mainland and Hawaii and Guam. No. 10-36165. The District Court dismissed the complaint on the basis of the filed rate doctrine.

### Air Carrier - Freight

1. To date 19 air carriers have entered guilty pleas and been sentenced with regard to allegations of fixing surcharges in connection with international air freight shipments. Fines have ranged from \$300 million (Korean Air) to \$15.7 million (EL AL). In addition four individual air carrier executives have plead guilty with three sentenced to 8 months in prison and one to 6 months. There are 17 other individual executives who have been indicted and are awaiting trial. One air carrier is awaiting trial after indictment.

2. In 2006 over 100 class action complaints were filed against approximately 30 airlines concerning price fixing on air freight surcharges. They have been consolidated in the U.S.D.C.E.D. of New York, MDL No. 1775. To date eleven defendants have settled with the plaintiffs.

### Air Carrier - Passenger

1. To date four air carriers have also entered guilty pleas and been sentenced with regard to allegations of price fixing with respect to passenger transportation. Their fines were combined with fines they were assessed concerning the cargo matters.

2. Two class actions relating to passenger air carriage are pending. One is in the U.S.D.C. N.D. of California and names 18 air carriers as defendants. In Re TransPacific Passenger Air Transportation Antitrust Litigation, MDL-1913. The allegations relate to cross-Pacific transportation. The case is pending.

3. The second class action brought in the U.S.D.C. C.D. of California alleges price fixing by two Korean based air carriers with respect to passenger service between the U.S. and South Korea. In Re Korean Air Lines Co., Ltd. Antitrust Litigation, MDL No. 07-01891. The case is pending.

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## Air Carriers - Miscellaneous

1. On April 21, 2011 U.S. Airways filed a suit against Sabre in the U.S.D.C. for the S.D. of New York alleging that Sabre violated both Sections 1 and 2 of the Sherman Act with respect to its operation of a Global Distribution System (GDS) which provides travel agents with information on airline schedules and fares and provides a method for booking flights. Sabre is the largest such system. 11-CV-2725. The case is pending.
2. On April 12, 2011 AMR Corporation, the parent of American Airlines, filed an antitrust suit in the U.S.D.C. N.D. Texas against Travelport LP and Orbitz Worldwide alleging that Travelport controls the distribution of airline tickets to a large number of business travelers and that Orbitz benefits from a purported Travelport monopoly. 11-CV-00244.

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