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Transportation Antitrust Cases, 2016

This report summarizes reported antitrust decisions in 2016 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2016 that included antitrust related transportation decisions for 2015.

Civil Actions – Air Transportation

In Re: Air Cargo Shipping Services Litigation, 2016 WL 1391304, 2016-1 Trade Cases ¶ 79,577 (E.D.N.Y. no. 06-1775, April 1, 2016).

In this case, the plaintiffs sought to be included in the disbursement of funds from agreements settling the claims against certain air carrier defendants that had been alleged to have conspired 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 that these plaintiffs – who had used freight forwarders to arrange shipments and were not direct customers of the air carriers for air cargo shipping services – were ineligible to participate in the settlement. The court noted that the claims brought by indirect purchasers previously had been dismissed and prior settlement agreements structured to encompass only direct purchasers; further, there was no evidence that the purchases at issue had utilized freight forwarders as brokers rather than as direct shippers.

Schenker, AG v. Societe Air France, 2016 WL 1465353, 2016-1 Trade Cases ¶ 79,590 (E.D.N.Y. no. 14-4711, April 14, 2016).

In this case, the plaintiff – a freight forwarder that had opted out of prior settlements – alleged that air carriers had conspired 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 denied the defendants' contention that the case should be dismissed because a related lawsuit was pending in the Netherlands. The court explained that the exceptional circumstances standard for the surrender of its jurisdiction had not been met, for reasons including that the parties and claims in the actions were different. The court also noted that although there was a general

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preference for the first-filed action, it did not apply to an action that sought declaratory relief in response to the threat of the litigation, as did the lawsuit in the Netherlands.

Boston Executive Helicopters, LLC v. Maguire, ___ F.Supp.3d ___, 2016 WL 3676120 (D.Mass. no 15-13647, July 6, 2016).

In this case, the plaintiff alleged that a municipal airport had conspired with the fuel provider at the airport to exclude the plaintiff from operating its own fueling operation at the airport, in violation of § 1 of the Sherman Act (15 U.S.C. § 1) and state antitrust law. The U.S. District Court for the District of Massachusetts held that the claims against the municipal defendants were barred by the doctrine of state action immunity set forth in Parker v. Brown, 317 U.S. 341 (1943), because Massachusetts law broadly authorized municipal airports to engage in competition-suppressing conduct.

Gordon v. Amadeus IT Group, S.A., 2016 WL 3676678, 2016-2 Trade Cases ¶ 79,688 (S.D.N.Y. no. 15-5457, July 6, 2016).

In this case, the plaintiff – on behalf of a class of consumers who had purchased airline tickets from major carriers – alleged that global distribution systems ("GDSs") had conspired to prevent the use of alternative distribution platforms, in violation of § 1 of the Sherman Act (15 U.S.C. § 1) and state antitrust laws. The U.S. District Court for the Southern District of New York held that the state law-based claims were preempted by the Airline Deregulation Act of 1978 (49 U.S.C. § 41713), on the basis that it was intended to preempt claims related to airline rates, even though the GDSs were not themselves carriers. But the court allowed the Sherman Act-based claim to proceed to discovery, rejecting the GDSs' argument that the consumers lacked standing or were otherwise barred from bringing their claims.

In re Domestic Airline Travel Litigation, ___ F.Supp.3d ___, 2016 WL 6426366, 2016-2 Trade Cases ¶ 79,811 (D.D.C. no. 15-1404, October 28, 2016).

In this case, the plaintiffs alleged that the four largest U.S. airlines had conspired to fix prices by suppressing capacity, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the District of Columbia denied the defendants' motion to dismiss, holding that the plaintiffs had standing to bring their claims, even though they had not pleaded that specific routes or city-pairs had been affected by the conspiracy and thus caused their injuries. The court further held that the plaintiffs has sufficiently pleaded and presented evidence of an agreement among the carriers to allow their claims to proceed, pursuant to the standards set forth in Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 554 (2007).

Additionally, on December 20, 2016, a jury verdict in US Airways, Inc. v. Sabre Holdings Group, S.D.N.Y. no. 11-2725, concluded that contract provisions by which Sabre required US Airways (now owned by American Airlines) to provide "full content" to Sabre had restrained trade in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The jury awarded US Airways $5 million in damages – considerably less than US Airways had requested, but automatically tripled under the Sherman Act. The jury also rejected the claim that Sabre had conspired with other GDSs pursuant to § 2 of the Sherman Act (15 U.S.C. § 2).

Prosterman v. American Airlines, Inc., 2016 WL 7157667 (N.D.Calif. no 16-2017, December 8, 2016).

In this case, the plaintiff travel agents alleged the three airlines defendants (American, Delta, and United) and the Airline Tariff Publishing Company ("ATPCO") had violated § 1 of the Sherman Act (15 U.S.C. § 1) through rules setting how flights would be priced when combined into larger itineraries. The U.S. District Court for the Northern District of California held that the claims should be dismissed because the plaintiffs failed to allege any agreement between the defendants, in contrast to parallel conduct, or any other "plus" factors that would enable them to meet the threshold required by Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 554 (2007).

Civil Actions – Surface Transportation

Meyer v. Kalanick, 174 F.Supp.3d 817, 2016-1 Trade Cases ¶ 79,565 (S.D.N.Y. no. 15-9796, March 31, 2016).

In this case, the plaintiff on behalf of a proposed class of Uber customers alleged that the CEO of Uber Technologies, Inc. had facilitated a price-fixing conspiracy in violation of § 1 of the Sherman Act (15 U.S.C. § 1) as well as state law (New York General Business Law § 340). In particular, the complaint alleges that Kalanick had conspired with Uber drivers to use an algorithm to set prices charged to Uber customers, thereby restricting price competition among drivers. The U.S. District Court for the Southern District of New York denied a motion to dismiss the complaint, explaining that the agreement between Uber and drivers had been alleged to be a horizontal agreement among the drivers and not just a vertical agreement between each driver and Uber. The court also held that the allegations of vertical agreements and the proposed market definition (of mobile app-generated ride-share services) were adequate. Subsequently, Uber was joined as a defendant (2016 WL 3509496, 2016-1 Trade Cases ¶ 79,675 (June 20, 2016)).

Stat Emergency Medial Service v. Saginaw Valley Medical Control Authority, 2016 WL 3902742, 2016-2 Trade Cases ¶ 79,699 (E.D.Mich. no. 13-14960, July 19, 2016).

In this case, the plaintiff alleged that a county medical authority had conspired to favor a single ambulance provider, in violation of §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2). The U.S. District Court for the Eastern District of Michigan held that the authority was not immune from liability, because although Michigan had granted certain powers to the authority, it had not adopted a public utility model for ambulance providers or otherwise authorized the authority to suppress competition. The court also rejected the authority's arguments that the case should be because its municipal parent actually entered into the ambulance dispatch agreements at issue, and the authority did not itself provide ambulance services.

Wallen v. St. Louis Metropolitan Taxicab Commission, 2016 WL 5846825, 2016-2 Trade Cases ¶ 79,785 (E.D.Mo. no. 15-1432, October 6, 2016).

In this case, the plaintiffs – which included Uber Technologies, Inc., as well as prospective drivers and passengers – alleged that a municipal taxi commission had violated § 1 of the Sherman Act (15 U.S.C. § 1) through its attempts to prohibit Uber from competing in the for-hire transportation market in St. Louis. The U.S. District Court for the Eastern District of Missouri held that the commission was not entitled to immunity, because its state-derived authority was to regulate public safety and maintain the integrity of the public transpiration system, not to engage in anti-competitive conduct. At the same time, the court dismissed claims against certain taxi companies, because even if their owners and managers served on the commission, the companies had not been alleged to be responsible for those individuals' actions.

Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc., 2016 WL 6525389, 2016-2 Trade Cases ¶ 79,815 (E.D.Penn. no. 16-1207, November 3, 2016).

In this case, the plaintiff alleged that Uber had sought to monopolize for-hire transportation services in Philadelphia, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. District Court for the Eastern District of Pennsylvania granted Uber's motion to dismiss the case, on the basis that the plaintiffs did not have antitrust standing. Although they had alleged injuries to themselves, such as a reduction in the value of their taxi medallions, they had not alleged injuries to competition – and indeed their own submissions indicated that Uber had improved competition. The court also held that allegations that Uber was operating in violation of state law or municipal regulations did not give rise to claims under antitrust law.

California Fire Chiefs Association, Inc. v. Backer, 2016 WL 7451548 (E.D.Calif. no 15-2351, December 26, 2016).

In this case, the plaintiffs requested a declaratory ruling that they could exclude competing emergency services providers – in particular, ambulance transportation – from their jurisdictions based on their authority under the California Health and Safety Code and the doctrine of state action immunity set forth in Parker v. Brown, 317 U.S. 341 (1943). The U.S. District Court for the Eastern District of California held that the claim was not ripe for adjudication, because no actual or imminent injury had been shown; although plaintiff's counsel had received a demand letter from two excluded emergency service providers, no litigation had been filed.

Department of Justice

On February 3, 2016, DOJ announced that BBA Aviation, the parent of Signature Flight Support, as a condition of its acquisition of Landmark Aviation had entered into an agreement to divest fixed-base operators ("FBOs") at six U.S. airports – Washington Dulles (IAD), Scottsdale Municipal (SDL), Fresno Yosemite (FAT), Jacqueline Cochran (TRM), Westchester County (HPN), and Ted Stevens Anchorage (ANC).

On April 6, 2016, DOJ announced that United Continental Holdings, Inc. had abandoned its plans to purchase twenty-four take-off and landing slots from Delta Air Lines, Inc. at Newark Liberty International Airport. In 2015, DOJ filed suit to block the transaction, on the basis that it would violate §§ 1-2 of the Sherman Act (15 U.S.C. §§ 1-2); on April 1, 2016, the Federal Aviation Administration announced that it planned to eliminate slot controls at the airport.

On April 8, 2016, DOJ announced that it had opposed the Canadian Pacific Railway Limited's proposal to the Surface Transportation Board that it be allowed to utilize a voting trust to maintain an interest in the Norfolk Southern Railway Company pending a review of a proposed merger between the two companies. Subsequently, the merger proposal was abandoned.

On June 7, 2016, DOJ announced that an executive of Compania Sudamericana de Vapores S.A. had been indicted based upon his alleged involvement in a conspiracy to fix prices for roll-on/roll-off ocean shipping services. Three corporations and four individuals previously had pleaded guilty to participation in the conspiracy, while three other individuals had been indicted. Subsequently, on July 13, 2016, DOJ announced that Wallenius Wilhelmsen Logistics AS also had agreed to plead guilty and pay a $98.9 million fine.

On October 14, 2016, DOJ announced that a former executive of Coach USA Inc. had pleaded guilty to concealing and attempting to destroy documents and providing false and misleading statements in connection with a civil antitrust investigation. In 2015, Coach USA, Inc. and City Sights LLC had been required to pay $7.5 million and to make divestitures because they had formed a joint venture that restrained trade in the New York City hop-on, hop-off tour bus market.

On December 6, 2016, DOJ announced that Alaska Airlines Group, Inc., as a condition of its acquisition of Virgin America, Inc., had agreed to significantly reduce the scope of its codeshare agreement with American Airlines, Inc., in order to ensure that post-acquisition Alaska would have the incentive to vigorously compete with American. Additionally, Alaska would be required to obtain DOJ's approval before selling or leasing any of the gates or slots that were divested to Virgin by American as a condition of DOJ approval of American's acquisition of US Airways Group in 2013.

Department of Transportation

On November 18, 2016, in Order 2016-11-16 (docket DOT-OST-2015-0129), DOT tentatively denied an application pursuant to 49 U.S.C. §§ 41308 and 41309 for antitrust immunity by American Airlines and Qantas. DOT stated that the proposed alliance would harm competition in the U.S.-Australia markets and

U.S.-Australasia markets by combining the largest carrier in those markets with the largest airline in the U.S. and the only U.S. airline likely to enter those markets in the future. DOT further noted that the markets were unusual because they are long and thin, and isolated from global traffic flows. The carriers subsequently withdrew their application, and DOT dismissed the proceeding on December 16, 2016 (Order 2016-12-15).

On December 14, 2016, in Order 2016-12-13 (docket DOT-OST-2015-0070), DOT approved an application pursuant to 49 U.S.C. §§ 41308 and 41309 for antitrust immunity by Delta Air Lines and Aeromexico, subject to conditions. DOT concluded that the joint venture could deliver public benefits, but also raised competitive issues. Accordingly, DOT conditioned its approval on the divestment of twenty-four slot-pairs at Mexico City's Benito Juarez International Airport (MEX) and four slot-pairs at New York City's John F. Kennedy International Airport (JFK), and also limited the duration of the grant of immunity to five years.

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.

Reprinted from The Transportation Lawyer (April 2017).

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