Transportation Antitrust Cases: 2017

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This report summarizes reported antitrust decisions in 2017 that involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2017 that included antitrust related transportation decisions for 2016.

Civil Actions — Ocean Transportation

In Re: Vehicle Carrier Services Antitrust Litigation, 846 F.3d 71 (3d Cir. 2017).

In this case, the plaintiffs—direct and indirect purchasers of ocean transportation of motor vehicles—brought a putative class action against ocean common carriers, alleging that the carriers had entered into secret agreements to fix prices and reduce capacity, in violation of various federal and state antitrust laws, including § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. Court of Appeals for the Third Circuit held that, because the carriers allegedly engaged in acts prohibited by the Shipping Act (46 U.S.C. § 40101, *et. seq.*), which both precludes private plaintiffs from seeking relief under the federal antitrust laws for such conduct and preempts state law claims, the district court had correctly dismissed plaintiffs' claims.

Wortman v. All Nippon Airways Co., Ltd., 854 F.3d 606 (9th Cir. 2017).

In this case, the plaintiffs—on behalf of a putative class of consumers—alleged that the defendants (All Nippon Airways, China Airlines, and EVA Airways) had colluded to fix the prices of certain passenger tickets and fuel surcharges on flights between the United States and Asia, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. Court of Appeals for the Ninth Circuit held that the filed rate doctrine did not preclude all of the plaintiffs' claims—in particular, the claims regarding the defendants' unfiled fares, fuel surcharges, and discount fares—because DOT had not exercised its authority to regulate such fares in such a manner to justify the application of the filed rate doctrine. On October 18, 2017, two of the defendants (All Nippon Airways and EVA Airways) filed a petition for a writ of certiorari in the U.S. Supreme Court (no. 17-659).

Danielson v. Tropical Shipping and Construction Co., 2017 WL 675178 (D.V.I. 2017).

In this case, the plaintiffs—a class consisting of individuals and entities that purchased less-than-a-container cargo ("LCL") shipping services—alleged that the defendants—carriers of containerized freight in the Caribbean—monopolized the LCL market from St. Croix to Florida. In particular, the plaintiffs asserted a monopolization claim, alleging that Tropical Shipping and Construction acquired its competitors (Caribtrans in 2008 and VI Cargo in 2010) and overcharged for its shipping services, in violation of § 2 of the Sherman Act (15 U.S.C. § 2) as well as the Virgin Islands Antitrust Act. The U.S. District Court of the Virgin Islands granted the defendants' motion to transfer the case to the U.S. District Court for the Southern District of Florida, finding that a forum selection provision applied to plaintiffs' antitrust claims. Separately, the court granted defendant Saltchuck Resources' motion to dismiss, after the parties reached an agreement on the record.

Civil Actions — Ground Transportation

AFMS, LLC v. United Parcel Service, Inc., 696 Fed. Appx. 293 (9th Cir. 2017).

In this case, the plaintiff alleged that the defendants (UPS and FedEx) had suppressed competition by refusing to work with it and other shipping consultants, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's

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grant of summary judgment in favor of the defendants, holding that the plaintiff had failed to define a cognizable market or to show that both it and the defendants were participants in that market.

Chamber of Commerce of United States v. City of Seattle, __F.Supp.3d__, 2017 WL 1233181 (W.D.Wash. 2017).

In this case, the plaintiffs sought to enjoin enforcement of a municipal ordinance that provided a mechanism through which for-hire drivers could collectively bargain with the companies that hire, contract with and/or partner with them. The plaintiffs argued that the Ordinance violated and was preempted by federal antitrust law, among other asserted grounds. The U.S. District Court for the Western District of Washington granted plaintiffs' request, finding that the plaintiffs had satisfied the relevant factors for an injunction. The court emphasized, however, that this ruling was not a decision on the merits, and subsequently the court granted a motion by the defendants to dismiss for failure to state a claim (2017 WL 3641901 (W.D.Wash. 2017)). The plaintiffs have appealed to the U.S. Court of Appeals for the Ninth Circuit.

Malden Transportation, Inc. v. Uber Technologies, Inc., __F.Supp.3d__, 2017 WL 6757545 (D.Mass 2017).

In this case, the plaintiffs—more than 700 taxicab medallion holders—alleged that Uber and two of its founders competed unlawfully in the on-demand, ride-hail ground transportation market, in violation of various federal and state laws, including § 2 of the Sherman Act (15 U.S.C. § 2). As for the individual defendants, the U.S. District Court for the District of Massachusetts granted a motion to dismiss, because the plaintiffs had failed to allege specific facts establishing either general or specific personal jurisdiction. With respect to Uber, the court allowed certain claims but denied other claims. The court found that prior to the enactment of the state's Transportation Network Companies Act, Uber's conduct was subject to the municipal taxi regulations, and thus, the plaintiffs' statutory and common law unfair competition claims sufficiently stated a cause of action. The court also found that plaintiffs had a plausible claim that Uber conspired with its independent contractor, third-party drivers, to violate the Taxi Rules. The court, however, rejected the claims specifically grounded in antitrust statutes, holding that the plaintiffs failed to allege specific facts to support predatory pricing.

City of Riverside v. Symons Ambulance, 2017 WL 2665208 (Cal. App.4th 2017).

In this case, the plaintiff alleged that the defendants were operating ambulance services, in violation of provisions of the Riverside Municipal Code (RMC), and asserted a cause of action for public nuisance and sought a preliminary and permanent injunction enjoining defendants from operating ambulance services originating in the City without a valid franchise. In response, defendants argued that the RMC was invalid under California's Emergency Medical Services Act (EMS) and § 1 of the Sherman Act (15 U.S.C. § 1). The Court of Appeal for California's Fourth Appellate District affirmed the issuance of a preliminary injunction, concluding that the plaintiff had demonstrated that it was likely to prevail on its public nuisance claim, and that defendants failed to show the invalidity of the RMC under either California law or federal antitrust law.

Civil Actions — Aviation

Prosterman v. American Airlines, Inc., 2017 WL 565051 (N.D.Cal. 2017).

In this case, the plaintiff travel agents alleged the three airline defendants (American, Delta, and United) and the Airline Tariff Publishing Company 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 plaintiffs filed a motion for relief from judgment and/or to alter or amend judgment, contending that the court erred in granting the defendants' motion to dismiss, because the plaintiffs had sufficiently alleged direct or circumstantial evidence of an unlawful conspiracy. The U.S. District Court for the Northern District of California rejected plaintiffs' contention, finding that the plaintiffs had failed to identify any direct evidence to support an "actual agreement" and also failed to identify the existence of extraordinary circumstances that would have prevented the plaintiffs from taking timely action to prevent or correct an erroneous judgment.

In Re: Delta/Airtran Baggage Fee Antitrust Litigation, 245 F.Supp.3d 1343 (N.D.Ga. 2017).

In this case, the plaintiffs—purportedly representing a class of approximately 28 million passengers—alleged that the simultaneous imposition of a $15 first-bag fee by the defendants (Delta and AirTran) was the result of unlawful collusion 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 the defendants' motions for summary judgment, explaining that while the plaintiffs had established a pattern of parallel behavior, they nevertheless had failed to demonstrate the existence of one or more "plus" factors that tend to exclude the possibility that the alleged conspirators acted independently.

US Airways, Inc. v. Sabre Holdings Corp., 2017 WL 1064709 (S.D.N.Y. 2017).

In this case, the plaintiff brought antitrust claims against defendants, a global travel distribution system, alleging various antitrust violations. A jury found that the defendants unreasonably restrained trade by imposing anticompetitive and unlawful contractual provisions that harmed competition and enabled defendants to charge higher booking fees than it would have been able to charge in a competitive market, in violation of § 1 of the Sherman Act (15 U.S.C. § 1), and awarded $5,098,142 in damages before trebling. The defendants filed a

motion for judgment as a matter of law on this claim or, in the alternative, for a new trial. The U.S. District Court for the Southern District of New York denied the defendants' motion, concluding that the evidence presented at trial was sufficient to support the jury's findings. The defendants subsequently filed an appeal to the U.S. Court of Appeals for the Second Circuit, requesting that the judgment be reversed and that the case be remanded or, in the alternative, for a new trial.

DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 246 F.Supp.3d 680 (E.D.N.Y. 2017).

In this case, the plaintiff alleged that the defendant had participated in an international price-fixing conspiracy to charge inflated freight-forwarding fuel surcharges, in violation of § 1 of the Sherman Act (15 U.S.C. § 1). The defendant moved for partial summary judgment, seeking dismissal of most of the antitrust claims, arguing that those claims had been discharged upon confirmation of defendant's Chapter 11 bankruptcy plan of reorganization. The U.S. District Court for the Eastern District of New York granted the defendant's motion, holding that the plaintiff could have filed its antitrust claim in the bankruptcy court, as a timely proof of claim before the pre-petition claim bar date, as a late proof of claim, or as a timely administrative claim before the administrative bar date, and as a result, the defendant's knowledge or lack of knowledge regarding its antitrust liability was irrelevant.

Department of Justice

On January 26, 2017, DOJ announced that a federal jury in Puerto Rico had convicted four individuals for participating in bid rigging and fraud conspiracies at an auction for public school bus transportation services, in violation of the Sherman Act. Each defendant was also found guilty of conspiracy to commit mail fraud and four counts of mail fraud, for fraudulently obtaining contracts for school bus transportation services.

On March 23, 2017, DOJ announced that a defendant, a former executive of Coach USA, Inc., had been sentenced for attempting to conceal and destroy documents relevant to a civil antitrust investigation and for providing false and misleading statements in connection with subsequent civil antitrust litigation. The defendant was ordered to serve 15 months in prison and ordered to pay a $5,000 criminal fine.

On June 23, 2017, the U.S. District Court for the District of Columbia entered a final judgment approving a settlement between DOJ and Alaska Air Group Inc., settling a lawsuit in which DOJ sought to require Alaska Air Group, Inc. to significantly reduce the scope of its codeshare agreement with American Airlines, Inc., as a condition of Alaska's completion of its $4 billion acquisition of Virgin America, Inc.

On June 27, 2017, DOJ announced that three shipping company executives had been indicted based on their alleged participation in a long-running conspiracy to allocate certain customers and routes, to rig bids, and to fix prices for the sale of international ocean shipments of roll-on, roll-off cargo to and from the United States. Including the three new indictments, eleven executives have been charged in this investigation to date. Four have pleaded guilty and been sentenced to serve prison terms, and four are international fugitives. In addition, four companies have also pleaded guilty, resulting in total collective criminal fines over $230 million.

On September 27, 2017, DOJ announced that defendant Höegh Autoliners AS has agreed to plead guilty and pay a $21 million criminal fine for its involvement in a conspiracy to fix prices, allocate customers, and rig bids. In addition to the fine, the defendant has agreed to be placed on corporate probation for three years to ensure full compliance with the antitrust laws.

On October 23, 2017, the U.S. Court of Appeals for the First Circuit affirmed a district court order denying the defendant's request for a new trial, in *U.S. v. Peake,* 874 F.3d 65 (1st Cir. 2017). The court held that the government's alleged *Brady* (suppression of evidence) violation did not warrant a new trial, and that the district court did not abuse its discretion in declining to hold an evidentiary hearing on the defendant's new trial motion. In 2013, a federal jury in Puerto Rico convicted the defendant for his participation in a conspiracy to fix rates and surcharges for water transportation of freight between the continental U.S. and Puerto Rico.

Note

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