# CASE NOTE:
# Transportation Antitrust Cases, 2019[1]

James A. Calderwood*

Jol A. Silversmith*

Andrew S. Yingling*

This report summarizes reported antitrust rulings in 2019 which involved transportation companies, and selected other antitrust developments which involved transportation companies. It updates the TLA Antitrust and Unfair Practices Committee report issued in April 2019 that included antitrust related transportation decisions for 2018.

## Civil Actions – Ocean Transportation

Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha, No. BER-L-6325-18, 2019 WL 2157545 (N.J.Super.L. March 29, 2019).

In this case, the plaintiff – a purchaser of roll-on, roll-off ocean transportation of motor vehicles – brought a suit against ocean common carriers, alleging that the carriers had entered into secret agreements to fix prices and reduce capacity, in violation of state law, including the New Jersey Antitrust Act. The defendants moved to dismiss the complaint, contending that the court lacked jurisdiction, because the Federal Maritime Commission was the proper and exclusive forum to adjudicate such claims. The Superior Court of New Jersey held that the state antitrust and related claims were preempted by the Shipping Act of 1984, noting that to allow the state law claims would "thwart Congress's goal of ensuring uniform regulation of ocean common carriers' business practices." The court separately held that, even if the state antitrust claims were not preempted, they would be time-barred by their four-year statute of limitations.

## Civil Actions – Rail Transportation

In re Rail Freight Fuel Surcharge Antitrust Litigations – MDL No. 1869, 934 F.3d 619 (D.C.Cir. 2019).

In this case, the plaintiffs – a putative class of over 16,000 rail shippers – alleged that the defendants, four of the nation's largest freight railroads (BNSF Railway; CSX Transportation; Norfolk Southern; and Union Pacific), conspired to fix rate-based fuel surcharges, in violation of section 1 of the Sherman Act (15 U.S.C. § 1). The plaintiffs also sought treble damages under section 4 of the Sherman Act and injunctive relief under section 16 of the Clayton Act (15 U.S.C. §§ 15, 26). The U.S. Court of Appeals for the D.C. Circuit affirmed the trial court's denial of class certification, on the grounds that the plaintiffs' regression analysis – their evidence for proving causation, injury, and damage on a class-wide basis – measured negative damages, and hence no injury, for over 2,000 (12.7 percent) members of the proposed class. The court also rejected the plaintiffs' contention that any lack of injury fell within a *de minimus* exception to the common injury requirement.

## Civil Actions – Ground Transportation

SC Innovations, Inc. v. Uber Technologies, Inc., No. 18-cv-07440-JCS, 2019 WL 1959493 (N.D.Cal. May 2, 2019).

In this case, the plaintiff brought antitrust claims against Uber Technologies and several of its subsidiaries, asserting claims for monopolization under the Sherman Act, and sales below cost for the purpose of injuring competitors under California's Unfair Practices Act. Defendants moved to disqualify plaintiff's counsel, the law firm Quinn Emanuel Urquhart & Sullivan, LLP, because of the firm's prior representation of Uber from 2012 to 2016, including the defense of several antitrust cases. The U.S. District Court for the Northern District of California granted defendants' motion to disqualify, reasoning that, although there is no "lifetime prohibition against representation adverse to a former client," the case involved claims based on Uber's alleged conduct during the same time that the firm served as Uber's sole outside litigation counsel and defended Uber against unfair competition and antitrust claims – including some claims turning on the same factual questions underlying the

* KMA Zuckert LLC (Washington, D.C.)

instant litigation.

Seaside Inland Transport v. Coastal Carriers LLC, No 2:17-cv-00143-SMJ, 2019 WL 4918747 (E.D.Wash. Oct. 4, 2019).

In this case, the plaintiff alleged that the defendants wrongfully terminated their freight-brokerage agency agreement, in violation of various state laws, including antitrust law. The U.S. District Court for the Eastern District of Washington granted defendants' motions to dismiss the antitrust claim, observing that any coordinated activities between defendants and their wholly owned companies are those of a single enterprise. The court found that the plaintiff failed to show a genuine dispute of material fact on whether defendants engaged in concerted action with outside persons or entities.

Tremont Public Advisors, LLC v. Connecticut Resources Recovery Authority, 333 Conn. 672 (2019).

In this case, the plaintiff, a public affairs firm, brought an action under state antitrust law alleging that the defendant, a quasi-public agency responsible for implementing a statutory solid waste management plan, engaged in a sham public bidding process and awarded a contract to a pre-selected entity. Specifically, the plaintiff averred that the defendant awarded the contract to an awardee that agreed to provide illegal lobbying activities on behalf of the defendant, thereby depriving the plaintiff and others of an opportunity to compete. The Supreme Court of Connecticut held that the plaintiff lacked standing to bring its claim, refusing to infer an antitrust injury from the allegation that pre-selection violated the competitive bidding process. Although the court expressed disquietude at the impropriety in the bidding process, it held that such corrupt practice is not sufficient to constitute an antitrust injury needed for standing under state law.

## Civil Actions – Aviation

Mulvey v. American Airlines Inc., No. 18-3119, 2019 WL 1060877 (D.D.C. 2019).

In this case, the *pro se* plaintiffs – who had requested to opt out of the settlement class in the underlying multidistrict litigation (in which the defendants were accused of colluding to control capacity and fix prices) – alleged that the four airline defendants (American, Delta, Southwest, and United), violated the Sherman Act (15 U.S.C. §§ 1, 3), by "artificially inflating prices and conspiring with one another to commit fraud on the plaintiffs." Defendants American and Delta moved to dismiss the complaint, asserting that the plaintiffs lacked standing under Article III of the Constitution and the antitrust laws. The U.S. District Court for the District of Columbia granted the motion to dismiss, finding that plaintiffs failed to establish standing, because they did not allege they purchased airline tickets for "domestic flights, at artificially inflated prices, or during the relevant time frame."

In re AMR Corporation, 597 B.R. 486 (Bankr.S.D.N.Y. 2019).

In this case, the plaintiffs in 2013 filed an adversary proceeding against defendants US Airways, AMR Corporation, and American Airlines, seeking to enjoin the entities' proposed merger (which had formed the basis for AMR Corporation's plan of reorganization). In particular, the plaintiffs alleged that the proposed merger would violation section 7 of the Clayton Act (15 U.S.C. § 18). The plaintiffs filed a motion for leave to amend their complaint to allege injury and treble damages under section 4 of the Clayton Act (15 U.S.C. § 15) and demand for a jury trial. The U.S. Bankruptcy Court for the Southern District of New York denied the motion, finding it untimely and prejudicial to the defendants, and requested relief that the court had previously denied or that was unavailable (i.e., a jury trial) before a Bankruptcy Court.

Dakota Territory Tours ACC v. Sedona-Oak Creek Airport Authority Incorporated, 383 F.Supp.3d 885 (D.Ariz. 2019).

In this case, the plaintiff – a helicopter air tour operator and former lessee at the Sedona Airport – brought an action against the county which owned the airport, asserting antitrust claims in connection with an allegedly "sham" request-for-proposal ("RFP") process by which the airport authority rejected the plaintiff's bid to sublease space at the airport and accepted a competing bid from a rival helicopter tour operator. The U.S. District Court for the District of Arizona granted the defendant's motion for judgment, concluding that the county was entitled to immunity from antitrust liability pursuant to the *Parker* "state action" doctrine. Separately, and alternatively, the court held that the plaintiff failed to state an antitrust claim against the county, finding that the plaintiff did "not allege facts sufficient to demonstrate that Yavapai County did anything more than own Sedona Airport during the RFP process."

Rojas v. Delta Airlines, Inc., No. GJH-19-665, 2019 WL 5893025 (D.Md. Nov. 12, 2019).

In this case, the plaintiffs – a proposed class of Mexican nationals, guardians of children under the age of two, and foreigners with resident status in Mexico who purchased airfare for flights from the United States to Mexico – brought an action against eight airline defendants, asserting, among other claims, violations of the Sherman Act (15 U.S.C. § 1). Specifically, the plaintiffs contended that the defendants illegally collected a "Mexican Tourism Tax" and failed to disclose the plaintiffs' exempt status and entitlement to a refund. The defendants each filed separate motions to dismiss or transfer the case to the Southern District of Georgia, where a related proceeding was previously dismissed. The U.S. District Court for the District of Maryland granted, in part, and denied, in part, the defendants' motions. The court denied the motion to transfer, finding that the "balance of factors" did not weigh in favor of defendants. But the court granted the motion to dismiss for failure to state a claim, holding that the antitrust claims were based on nothing more than parallel conduct and that the suggested "plus factors" did not establish an antitrust conspiracy.

US Airways, Inc. v. Sabre Holdings Corporation, 938 F.3d 43 (2d. Cir. 2019).

In this case, the plaintiff brought antitrust claims against the defendant, a global travel distribution system, alleging that so-called "full content" provisions

contained in its contracts with the defendants were unlawful restraints of trade. At trial, a jury returned a verdict for the plaintiff on its claim that the provisions 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 section 1 of the Sherman Act (15 U.S.C. § 1), and awarded $5,098,142 in damages, before trebling. Both parties appealed. A three-judge panel of the U.S. Court of Appeals for the Second Circuit invalidated the damage award, because the jury's primary verdict was based on its finding that the relevant market was one-sided and injured the airline. In light of the Supreme Court's recent opinion in *Amex II*, the court determined that the verdict was erroneous, since the relevant market for a transaction platform must be two-sided, including both airlines and travelers. As for plaintiff's cross-appeal, the court held that the trial court prematurely dismissed its claims that defendants monopolized the distribution of services to subscribers.

In re Domestic Airline Travel Antitrust Litigation, 378 F.Supp.3d 10 (D.D.C. 2019).

In this case, the plaintiffs – a settlement class comprised of approximately 100 million passengers – alleged that four airline defendants (Southwest, American, Delta, and United) violated section 1 of the Sherman Act (15 U.S.C. § 1), by colluding to limit capacity and increase prices for domestic airfares. Following consolidation by the U.S. Judicial Panel on Multidistrict Litigation, the plaintiffs reached settlements with defendants Southwest and American, and subsequently moved for final approval of the agreements. The U.S. District Court for the District of Columbia granted approval of the settlements, finding that the agreements were fair, reasonable, and adequate as to and in the best interest of the class members.

## Department of Justice

On June 25, 2019, DOJ announced that two corporate executives, Robert Dip and Jason Handal, were sentenced in the U.S. District Court for the Southern District of Florida for their role in a conspiracy to fix prices of international freight forwarding services. According to the criminal complaint, the executives met at several locations in Honduras and the United States, and reached agreements with their competitors to fix prices for freight forwarding services charged to U.S. consumers. Dip and Handal were sentenced to eighteen- and fifteen-month prison terms, respectively, and ordered each to pay a $20,000 criminal fine and to three years of supervised release.

On June 26, 2019, DOJ announced that two corporate executives, Ingar Skiaker and Øyvind Ervik, had been indicted based on their alleged participation in a long-running conspiracy to allocate certain customers and routes, rig bids, and fix prices for the sale of international ocean shipments of roll-on, roll-off cargo to and from the United States. Skiaker and Ervik are former top executives at Höegh Autoliners AS, which has pleaded guilty and been sentenced to pay a $21 million fine. Including the two new indictments, 13 executives have been charged in the investigation to date. Four have pleaded guilty and been sentenced to prison terms; others remain international fugitives. Including Höegh, five shipping companies have also pleaded guilty for their roles in this conspiracy, resulting in total collective criminal fines over $255 million.

On September 17, 2019, DOJ announced that Dip Shipping Company LLC, a Louisiana-based freight forwarder, has agreed to plead guilty to an antitrust charge for its role in a conspiracy to fix prices of freight forwarding services sold to customers in the United States and elsewhere. According to one-count felony charge, the company conspired with other providers of freight forwarding services to fix, raise and maintain prices charged to customers. Under the terms of its plea agreement, Dip Shipping agreed to pay a $488,250 criminal fine. Robert Dip and Jason Handal were executives of Dip Shipping.

On October 24, 2019, DOJ announced that the owner of a Houston-based freight forwarding company, Francis Alvarez, pleaded guilty to an antitrust charge for her role in a multi-year, nationwide conspiracy to fix prices for international freight forwarding services. According to a one-count felony charge, Alvarez and her co-conspirators agreed to fix, raise and maintain prices for freight forwarding services provided in the United States. In addition to admitting to participation in the conspiracy, Alvarez has agreed to pay a criminal fine and cooperate with the ongoing investigation.

**Endnotes**

[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.