CASE NOTE: Transportation Antitrust Cases 2020

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This report summarizes reported antitrust rulings in 2020 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 2020 that included antitrust related transportation decisions for 2019.

Civil Actions – Ocean Transportation

Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha[1]

In this case, the plaintiff, a purchaser of roll-on, roll-off ocean transportation of motor vehicles, filed 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 trial court dismissed the plaintiff's claims with prejudice, agreeing with the Third Circuit's decision in In re Vehicle Carrier Services Antitrust Litigation[2] that the Shipping Act of 1984 preempted all state law claims. On appeal, the plaintiff argued that the court improperly relied on the Third Circuit's decision, asserting that its "claims do not pose an obstacle to the accomplishment of the purpose of the Act." The Superior Court of New Jersey, Appellate Division affirmed the trial court's dismissal, holding that the Shipping Act preempted the state antitrust and related claims, observing that "regulation of international maritime commerce is peculiarly federal."

Civil Actions – Rail Transportation

In re Rail Freight Fuel Surcharge Antitrust Litigation (No. II)[3]

In this case, the plaintiffs – over 300 rail freight shippers – alleged that the defendants (the four largest railway companies operating in the United States), engaged in a multi-year price-fixing conspiracy to increase the price of rail freight transport through their coordinated efforts to cause an industry trade group to adopt a new cost index that excluded the cost of fuel – and then to implement, in lockstep, artificially inflated fuel surcharges – in violation of Section 1 of the Sherman Act[4] and Section 4 of the Clayton Act.[5] The defendants moved to dismiss the complaints or, in the alternative, to strike new factual allegations raised by the plaintiffs, on the grounds that the complaints were time-barred under the Clayton Act's statute of limitations. The U.S. District Court for District of Columbia denied the defendants' motions, concluding that the underlying factual allegations asserted in the complaints generally were not time-barred. The court held that the limitations period was tolled, consistent with American Pipe & Construction Co. v. Utah[6] because the plaintiffs were former putative class members of earlier class proceedings and their claims fell within the scope of the class proposed to be certified.

Civil Actions – Ground Transportation

Zummo v. City of Chicago[7]

In this case, the plaintiff – a licensed taxi medallion holder – alleged that the City had illegally engaged in "restraint of trade," in violation of federal antitrust laws, and also violated his constitutional rights and various state laws, by failing to regulate ridesharing companies (such as Uber and Lyft) in the same manner as taxicabs. The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of his complaint in its entirety for failure to state a claim. The court rejected the plaintiff's antitrust claim, finding that he had failed to allege an agreement or conspiracy between the City and any other party, as required by section 1 of the Sherman Act (15 U.S.C. § 1). The court also denied the constitutional claim, noting that the City has the power to

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permit more market entrants and that the plaintiff had no cognizable interest in the value of his medallion. Finally, the court dismissed the state law claims, in part, because the plaintiff conceded that the City did not commit any "physical or verbal actions of fraud."

Allen v. United States[8]

In this case, the plaintiff – the president and owner of a freight forwarder/broker and vendor of transportation services – filed a complaint against the United States, alleging that several government employees launched a conspiracy to "destroy" his business, in violation of section 1 of the Sherman Act.[9] The plaintiff moved to amend his complaint, and the government moved to dismiss for failure to state a claim. The U.S. District Court for the Southern District of Illinois denied the plaintiff's request to file a second amended complaint, stating that the new arguments would not survive a motion to dismiss and therefore, inclusion in the complaint would be futile. Separately, the court granted the government's motion to dismiss, ruling that Section 1 of the Sherman Act does not subject the United States to liability.

SC Innovations, Inc. v. Uber Technologies, Inc.[10]

In this case, the plaintiff, a defunct transportation network company, brought an antitrust action against Uber Technologies and a number of its subsidiaries ("Uber"), asserting claims for monopolization and attempted monopolization, based both on predatory pricing and on exclusionary tortious conduct, in violation of section 2 of the Sherman Act,[11] as well as sales below cost for the purpose of injuring competitors, in violation of the California Unfair Practices Act.

On January 21, 2020, the U.S. District Court for the Northern District of California had granted Uber's motion to dismiss the plaintiff's first amended complaint, dismissing the Sherman Act claims with leave to amend, and its Unfair Practices Act claim with prejudice. The court ruled that the plaintiff alleged no more than a "disciplined oligopoly," insufficient to state a claim under the Sherman Act. The court also determined that Uber fell within an exemption from the statute for products and services for which rates are set under the jurisdiction of the California Public Utilities Commission. The plaintiff filed a second amended complaint, and Uber moved once again to dismiss.

On May 1, 2020, the court denied Uber's renewed motion to dismiss as to the Sherman Act claims, because the plaintiff plausibly alleged that Uber could unilaterally raise the "price" that it keeps for itself from ride-hailing transactions to supra-competitive levels – through fare increases not fully passed on to drivers, commission increases reducing drivers' pay not offset by discounts for passengers, or a combination of the two – while insulated by network effects from a competitor or a new market entrant usurping Uber's market share. However, the court granted Uber's motion to strike the Unfair Practices Act claim, explaining that the Ninth Circuit no longer requires a plaintiff to re-allege a claim solely to preserve its right to appeal its dismissal.

Uber Technologies Pricing Cases[12]

In this case, the plaintiffs – several taxi companies and taxi medallion owners – filed suit against Uber Technologies, Inc. ("Uber"), alleging that Uber set prices for its ride services below their average total cost, for the "specific purpose of injuring and eliminating its competitors in the traditional taxi business," in violation of the California Unfair Practices Act's ("UPA") prohibition against below-cost sales and, in turn, violation of the California Unfair Competition Law ("UCL"). The trial court dismissed the plaintiffs' amended complaint, ruling that a statutory exemption foreclosed their claims under the UPA, and also their derivate claim under the UCL. The Court of Appeal for the First Appellate District affirmed, determining that, although the California Public Utilities Commission ("CPUC") had not yet established rates for transportation network companies and charter-party carriers such as Uber, the UPA's statutory exemption nevertheless applied because the CPUC has rate-setting jurisdiction. The court separately denied Uber's belatedly raised jurisdictional challenge to the trial court's jurisdiction, reasoning that while extensive rulemaking is still ongoing, "nothing indicates the CPUC is contemplating imminent exercise of its authority to set rates."

Civil Actions – Aviation

United States v. Sabre Corp.[13]

In this case, the United States filed an expedited antitrust action seeking to permanently enjoin the proposed acquisition by defendants Sabre Corporation and Sabre GLBL Inc. ("Sabre") of defendants Farelogix Inc. ("Farelogix") and Sandler Capital Partners V, L.P. The government contended that allowing Sabre to acquire Farelogix would harm competition, and thereby violate section 7 of the Clayton Act.[14] The U.S. District Court for the District of Delaware held that the government failed to establish a prima facie case that the merger would violate the Clayton Act. As a matter of antitrust law, the court explained, Sabre, which is a two-sided platform facilitating transactions between airlines and travel agencies, does not compete with Farelogix, which only interacts with airlines and is not a two-sided platform. The court also found that the government's market analysis failed because it did not relate to the relevant product market or the relevant geographic market. Even if the government had made out a prima facie case, the court observed, it failed to prove likely harm to competition in the market. Sabre and Farelogix subsequently announced the termination of their merger agreement (see below), and the court vacated its ruling.

Department of Justice

On January 23, 2020, DOJ announced that Maria Christina "Meta" Ullings, the former senior vice president of cargo sales and marketing for Martinair N.V. (Martinair Cargo) and a Dutch national, pleaded guilty for her role in a long-running air cargo price-fixing conspiracy.[15] Ullings pleaded guilty to conspiring with others to suppress and eliminate competition by fixing and coordinating certain surcharges, including fuel surcharges, charged to customers located in the United States and elsewhere for air cargo shipments. Ullings was sentenced to 14 months in prison with credit for the time she was held in the custody of the Italian government pending her extradition, as well as to pay a $20,000 criminal

fine. Including Ullings, a total of 22 airlines and 21 executives have been charged in DOJ's investigation into price fixing in the air transportation industry. To date, more than $1.8 billion in criminal fines have been imposed and eight executives have been sentenced to serve prison time.

On May 1, 2020, DOJ announced that Sabre Corporation and Farelogix, Inc. had agreed to terminate their merger agreement.[16] DOJ had filed a civil antitrust lawsuit to block Sabre's $360 million acquisition of its rival Farelogix to "preserve the significant head-to-head competition between these two companies that has substantially benefitted airlines and consumers." Although the U.S. District Court for the District of Delaware denied DOJ's request to block the merge, the United Kingdom's Competition & Markets Authority ("CMA") found the deal unlawful under U.K. competition law. "The United Kingdom's CMA decision to block Sabre's acquisition of Farelogix confirms our view that the merger was anticompetitive," said Assistant Attorney General Makan Delrahim of DOJ's Antitrust Division.

Department of Transportation

On March 13, 2020, DOT made final its tentative decision in Order 2019-10-15, which granted approval of the alliance agreements between Hawaiian Airlines, Inc. and Japan Airlines Co., Ltd. (the "joint applicants"), to the extent that their agreements are consistent with U.S. antitrust law.[17] DOT denied without prejudice, however, their request for a grant of antitrust immunity, because it determined that the joint applicants had not met the statutory and policy standards necessary to obtain such immunity, and that the airline partners could proceed readily without immunity. Although the joint applicants had submitted a substantial amount of new information intended to address DOT's concerns, DOT found the new data insufficient to warrant a grant of immunity.

On October 23, 2020, DOT granted tentative approval of, and antitrust immunity for, the proposed alliance between Delta Airlines, Inc. and WestJet (the "joint applicants") that would allow both carriers to jointly plan, price, and share revenues along with costs under a joint venture ("JV") covering routes between the United States and Canada.[18] DOT tentatively concluded that, subject to certain remedies and conditions, e.g., exclusion of a wholly-owned subsidiary, divestiture of eight slot pairs at New York City-LaGuardia Airport, and the removal of exclusivity provisions from the JV, the proposed immunized alliance was unlikely to materially harm competition in relevant markets. On December 21, 2020, however, DOT granted the joint applicants' motion for leave to withdraw their application and dismiss the proceeding.[19] The joint applicants had objected to DOT's tentative findings and stated their unwillingness to accept DOT's proposed conditions.

On November 16, 2020, DOT tentatively granted the motion of American Airlines, Inc., British Airways PLC, OpenSkies SAS, Iberia Líneas Aéreas de España, S.A., Finnair OYJ, and Aer Lingus Group DAC ("Aer Lingus") to amend DOT Order 2010-7-8 and extend the existing grant of antitrust immunity to Aer Lingus.[20] DOT's analysis indicated that adding Aer Lingus to the joint business agreement would result in public benefits that were greater than any potential harm stemming from the proposed joint business agreement. On December 21, 2020, DOT issued a final order finalizing its tentative findings and expanding the immunity to include Aer Lingus.[21]

Endnotes

1 No. A-3850-1T3, 2020 WL 4577166 (N.J. Super. Ct. App. Div. August 10, 2020).
2 846 F.3d 71 (3d. Cir. 2017).
3 MDL No. 2925, 2020 WL 5016922 (D.D.C. August 25, 2020).
4 15 U.S.C. § 1.
5 15 U.S.C. § 15.
6 414 U.S. 538 (1974).
7 No. 18-3531, 798 Fed. Appx. 32 (7th Cir. 2020).
8 No. 19-1065, 2020 WL 2616265 (S.D.Ill. May 22, 2020).
9 15 U.S.C. § 1.
10 No. 18-7440, 2020 WL 2097611 (N.D.Cal. May 1, 2020).
11 15 U.S.C. § 2.
12 46 Cal.App.5th 963 (Cal. Ct. App. 1st Dist. March 23, 2020).
13 452 F.Supp.3d 97 (D.Del. April 7, 2020).
14 15 U.S.C. § 18.
15 Press Release, U.S. Dep't of Justice, Extradited Former Air Cargo Executive Pleads Guilty for Participating in Worldwide Price-Fixing Conspiracy (Jan. 23, 2020).
16 Press Release, U.S. Dep't of Justice, Statement from Assistant Attorney General Makan Delrahim on Sabre and Farelogix Decision to Abandon Merger (May 1, 2020).
17 Final Order, Order 2020-3-5 (Mar. 13, 2020).
18 Order to Show Cause, Order 2020-10-13 (Oct. 23, 2020).
19 Order Dismissing Proceeding, Order 2020-12-17 (Dec. 21, 2020).
20 Order to Show Cause, Order 2020-11-9 (Nov. 16, 2020).
21 Final Order, Order 2020-12-20 (Dec. 21, 2020).