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Posted at 2:04 PM on November 10, 2009 by Sheppard Mullin

Sixth Circuit Affirms Dismissal of Travel Agent Commission Antitrust Claims

On October 2, 2009, the United States Court of Appeals for the Sixth Circuit ruled in favor of defendant airline carriers1[1] accused of conspiring to reduce, cap and ultimately eliminate the base commissions paid to travel agents selling defendants' airline services in *In re Travel Agent Commission Antitrust Litigation*. The Sixth Circuit's decision is the latest to embrace the pleading standards of *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) by requiring plaintiffs to plead non-conclusory factual allegations that raise a "plausible suggestion of conspiracy."

Background

In re Travel Agent Commission Antitrust Litigation was brought by 49 travel agencies that had opted out of a class action in favor of their own joint lawsuit. The travel agents alleged that the defendant airlines entered a conspiracy to eliminate base rate commissions as early as 1995, when several major U.S. airlines announced that they would lower the commissions paid to travel agents. The downward pressure on commission rates persisted when, in 1997, United announced an additional reduction in its base commissions rate that was quickly matched by several other carriers. This alleged "follow-the-leader" trend continued until the Spring of 2002, when the airlines decided to discontinue the once industry-wide practice of paying base commissions for tickets purchased through travel agents.

To try to demonstrate an illicit agreement, the travel agents focused on (i) the deposition testimony of a former airline executive, who stated that "industry consensus" was necessary for the commission cuts to hold; (ii) industry-wide meetings and conferences that afforded defendants an opportunity to conspire; and (iii) a three-hour conference room meeting and a golf outing involving executives of rival airlines.

The United States District Court for the Northern District of Ohio dismissed plaintiffs' suit on grounds that (i) the claims against United were discharged in bankruptcy proceedings initiated in December 2002 and concluded in January 2006; and (ii) as to the remaining defendants, the Amended Complaint did not set forth sufficient facts to plausibly suggest an illicit agreement.

For the reasons set forth below, the Sixth Circuit Court of Appeals affirmed the district court's decision.

The Sixth Circuit's Opinion

First, the court of appeals addressed plaintiffs' argument that their claims against United were viable despite its bankruptcy proceedings. To circumvent the hurdle interposed by 11 U.S.C. § 1141(d), which discharges any debt, including liability on a claim, when a plan of reorganization is confirmed by the court, plaintiffs conjured a variance on the "continuing violation" theory of liability articulated in *Klehr v. A.O. Smith Corporation*, 521 U.S. 179 (1997). Specifically, plaintiffs maintained that upon emerging from bankruptcy, United rejoined the conspiracy by maintaining its zero-commission policy. The court rejected plaintiffs' theory, noting that it essentially eviscerated any semblance of a bankruptcy limitations period and allowed a plaintiff to "routinely salvage an otherwise untimely claim by asserting that it continues to lose revenue because of past alleged anticompetitive conduct."

Next, the court considered whether the Amended Complaint contained factual allegations that raised the right to relief above a speculative level as required by *Twombly*. The crux of the court's inquiry was whether plaintiffs demonstrated the existence of an illicit agreement. The court concluded that plaintiffs did not satisfy *Twombly's* threshold. The very conduct that plaintiffs deemed indicative of an unlawful agreement—*i.e.*, parallel conduct—was equally consistent with "lawful, unchoreographed free-market behavior." To the extent that the base commission rates were determined through "a common reaction of firms in a concentrated market that recognize their shared economic interests and interdependence with respect to price and output decisions," such conscious parallelism was "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," rather than furnishing proof of an unlawful agreement.

The court also found that plaintiffs took the executive's deposition testimony out of context After reviewing the deposition in its entirety, the district court concluded that the airline's "2001 commission cap was an effort to reduce its internal commission costs, with the ancillary hope that its competitors would follow its lead." The court noted that the airline's decision coincided with technological advances in airline ticket purchasing, such as direct purchases on the Internet, that diminished the role of travel agents.

Similarly, the court declined to infer an agreement simply because defendants' executives had an opportunity to conspire at industry-wide gatherings, reasoning that the Amended Complaint did not identify the conspirators or state when or where the agreement was consummated in anything but conclusory terms. Finally, the court noted that reducing travel agents' base commissions was hardly inconsistent with defendants' economic self-interest. To the contrary, "it was simple and inexpensive for a leader airline to innovate and then wait and see, with the hope and expectation that its competitors would institute similar cuts. If the industry did not follow, the leader airline could simply retract the cut." The court therefore believed that "each defendant had a reasonable, independent economic interest in adopting a competitor's commission cut rather than to maintain the status quo."

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2[1] The following airlines were named as defendants in plaintiffs' Amended Complaint: Air Canada, Alaska Airlines, Alaska AirGroup, Inc., ATA Airlines, Inc., American Airlines, Inc., America West Airlines, Inc., Continental Airlines Inc., Delta Air Lines, Inc., Hawaiian Airlines, Inc., Horizon Air Industries, Inc., Frontier Airlines, Inc., KLM Royal Dutch Airlines, Northwest Airlines, Inc., United Airlines, Inc., US Airways, Inc. and US Airways Group, Inc.