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Court Dismisses Claims Against Shippers Under *Twombly* And The Filed Rate Doctrine

On August 18, 2009, the District Court for the Western District of Washington dismissed with leave to amend an MDL action against shippers for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, based on allegations that the shippers colluded to simultaneously increase fuel surcharges, illegally shared vessel capacity, and conspired not to enter into extra-tariff rate agreements with customers. *In re Hawaiian and Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ ("Pacific Shipping MDL"), Order No. 5 (W.D. Wa., Aug. 18, 2009) ("Slip Op.").

Background

Plaintiffs were individuals or entities that allegedly directly purchased from the defendants shipping services on ocean routes between the continental United States and Hawaii, Guam or both between October 11, 1999 and May 31, 2008. Defendants were alleged to control 96% of the trade between the U.S. west coast and Hawaii and 100% of the trade between the west coast and Guam. Trade between domestic United Sates ports, such as that alleged in the case, is subject to "significant legal and regulatory barriers to entry" and "is not a contestable market," which, by contrast, would be one characterized by relatively easy and cost-free entry and exit with little or no sunk costs. Slip Op. at 2 (quoting *Matson Navigation Co. v. Fed. Maritime Comm'n*, 959 F.2d 1039, 1047 (D.C. Cir. 1992)).

The defendants were members of various industry trade associations. They also provided data on container size and quantities, as well as cargo quantities, weights, and volumes to the Port of Import Export Reporting Service ("PIERS") but no allegations were made that they supplied any pricing data to PIERS. *Id*. at 3. Pursuant to regulations, defendants were required to file their rates with the Surface Transportation Board ("STB") except as to certain statutorily exempt cargo, or cargo carried pursuant to separate written agreements with specific shippers whereby both sides waive their statutory rights. Plaintiffs alleged that defendants colluded not to enter into "extra-tariff agreements" which would be confidential and thus would inhibit the defendants' ability to "police each other's conduct." *Id.*

Plaintiffs further alleged that defendants also imposed fuel surcharges in lockstep 29 different times since October 1999, which far outpaced the rising cost of bunker fuel, and that defendants' parallel pricing bore no correlation to their actual, individual costs, which vary by carrier. *Id.*

Plaintiffs thus inferred that these surcharges were set pursuant to illegal agreements. *Id.* at 3-4. Finally, plaintiffs alleged that defendants' agreements to share vessel capacity also violated the antitrust laws. *Id.* at 4.

The Complaint Pled Nothing More than "Parallel Conduct and Bare Assertion of Conspiracy" and thus Failed the Twombly and Rule 8 Pleading Standards

The Court first analyzed the complaint under the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny. The Court noted that a valid antitrust complaint "must contain enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement" by offering "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action." *Id.* at 5 (quoting *Twombly*, 550 U.S. at 555-57).

The Court noted that plaintiffs relied on the following factual allegations to support their complaint: (i) information exchanges through participation in trade associations and the like; (ii) evidence of antitrust violations in a different ocean trade route revealed by the Department of Justice's ("DOJ") investigation which led to several guilty pleas, some of which concerned one of the defendants' executives; and (iii) parallel conduct in a concentrated and incontestable market. Slip Op. at 6.

With respect to the first set of factual allegations, the Court noted what sets cases surviving motions to dismiss under *Twombly* apart is the "inclusion of specific allegations concerning time, place, and person versus general allusions to 'secret meetings,' 'communications,' or 'agreements.'" *Id.* These would include allegations of "direct evidence of an agreement to fix prices," such as specific communications between the defendants. *Id.* at 12. The plaintiffs, however, only alleged that, because the defendants belonged to certain trade organizations, they had the "opportunity" to meet and collude. *Id.* at 7. They offered "no particulars concerning the locations or dates of any meetings," did not "identify any individual who might have been involved in any illicit communications," and made "no attempt to compare the timing of trade association meetings and fuel surcharge increases." *Id.* Plaintiffs' general allegations of membership in trade associations were insufficient to carry their burden.

Turning to the DOJ's investigation of an unrelated shipping route, the Court dismissed plaintiffs' reliance on guilty pleas entered by some executives of one of the defendants because only one of those individuals was alleged to have any involvement in the Hawaii and Guam routes. Further, plaintiffs had failed to allege that the charges against this person or his guilty plea had anything to do with the shipping trade routes involved in this case. *Id.* at 8-9 (plaintiffs "provide no link between the Puerto Rico and Hawaii or Guam markets"). Moreover, plaintiffs failed to establish that the same persons involved in the DOJ's investigation and pleas had pricing responsibilities for both markets. *Id.* at 9.

The Court also rejected plaintiffs' allegations of parallel conduct. The Court noted that Twombly and its progeny have identified certain types of factual allegations that would survive a motion to dismiss, "including direct evidence of an agreement or communications between defendants and descriptions of historical pricing practices suggesting a lack of precedent and no discernable reason for change other than conspiracy." *Id.* at 10. The Court found that plaintiffs had not

identified any specific communications or agreements; did not provide any data concerning pricing practices predating the alleged period of the violation; and failed to link the lockstep fuel surcharges to anything but "the type of parallel conduct generally present in a homogeneous market." *Id.* at 11. The Court further observed that price watching is inherent in a tariff system that statutorily requires carriers to publish their common carrier rates. *Id.* at 11. Accordingly, neither the individual allegations nor the factual allegations as a whole established anything other than parallel conduct. *Id.* at 14.

The Consolidated Complaint Implicated the Filed Rate Doctrine and Plaintiffs Failed to Allege Facts Showing that Either of the Statutory Exceptions Applied to Their Claims

Turning next to the filed rate doctrine, the Court explained that, the Supreme Court provided four reasons in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922) for its decision that the "doctrine precludes monetary relief for antitrust and similar claims relating to tariffs or schedules filed with a federal regulatory agency:" (1) plaintiff could not establish the requisite injury because the carrier is required to charge and the shipper is required to pay to filed rate; (2) Congress delegated to a regulatory agency the authority to determine whether a filed rate was reasonable, and plaintiff's claims would essentially seek a remedy contrary to the agency's decision; (3) the law prohibits discrimination by carriers, and so plaintiff could not be awarded monetary damages which effectively would "operate to give him preference over his trade competitors; and (4) alleged damages rested on speculation as to what rate would have been in effect but for the alleged anticompetitive conduct, and that any lower rates would inure to the benefit of the plaintiff rather than his customers or the ultimate consumer. Slip Op. at 14-15.

The Court noted that pursuant to Interstate Commerce Commission Termination Act of 1995, tariffs must be filed with the STB for movement of household goods or for transportation or service in noncontiguous domestic trade. *Id.* at 20. Moreover, a carrier may not charge a different rate than specified in the tariff. *Id.* The STB has jurisdiction over any claim that a filed tariff or "related rule or practice" is unreasonable. *Id.* The only exceptions are "(i) if the items being shipped [in such trade] constitute bulk cargo, forest products, recycled metal scrap, waste paper or paper waste, . . . and (ii) if the carrier and the shipper have entered into a contract concerning 'specified services under specified rates and conductions' for cargo other than household goods, and they have expressly waived in writing 'any or all rights and remedies under [the statute].'" *Id.* at 21.

Plaintiffs first argued that the doctrine is inapplicable because defendants have not proven that they properly filed their rates and thus could not rely on improperly filed rates as a defense. *Id.* The Court rejected that argument observing that "neither procedural irregularity nor unreasonableness nullifies a filed rate." *Id.* (quoting *Sec. Servs., Inc. v. Kmart Corp.*, 511 U.S. 431 (1994)). Nor did plaintiffs allege any deficiencies in defendants' tariffs that would void the file rates. *Id.* at 22. Indeed, they alleged no irregularities in defendants' filed rates. *Id.* at 21.

The Court also dismissed plaintiffs' second argument that defendants have failed to prove that the cargo was subject to rate regulations (i.e., that it was not exempt from rate filing). Here, plaintiffs identified four entities with the words "Trees" and "Woods" in their names but did not indicate "what cargo was shipped by any of these companies," instead implying that the cargo

was trees or wood. *Id.* at 22. The Court concluded that"[w]hether such trees or woods would qualify as 'forest products' or be otherwise excluded from tariffs was not pleaded or briefed and remains unclear." Id. The Court also rejected plaintiffs' attempt to place the burden on the defendants to prove a negative. *Id.*

Other Claims Also Implicated the Filed Rate Doctrine

Finally, the Court held that defendants' "non-rate activities" – namely, their vessel capacity sharing agreements and their purported refusal to enter into extra-tariff rate agreements – also implicated the filed rate doctrine because the gist of these claims was that, but for these activities the price of shipping would have been lower. *Id.* at 25. The Court further noted that plaintiffs were merely identifying factors "that might or might not have influenced defendants' rates" and so "[p]laintiffs' claims are more appropriately addressed to the STB." *Id.* at 26.

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