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ANTITRUST

Expert Analysis

Airline Merger to Proceed With Landing Rights Divestitures

By **Elai Katz**

Two weeks before trial on its bid to stop the merger of American Airlines and US Airways, the Department of Justice agreed to allow the transaction to proceed subject to divestitures of take-off and landing slots and gates at several major airports. A district court refused to dismiss a Department of Justice complaint alleging that senior executives at eBay and Intuit agreed to refrain from hiring one another's employees.

Other antitrust developments of note included an opinion by the U.S. Court of Appeals for the Second Circuit affirming the dismissal of a complaint asserting a conspiracy to undercut rival insurance estimation software providers and a district court decision that relied on the long-standing antitrust exemption for baseball in dismissing claims that the league prevented the Oakland A's from moving to San Jose in violation of antitrust law.

Airline Merger

The Justice Department announced a proposed settlement of its suit to enjoin the merger of American Airlines and US Airways. *United States v. US Airways Group*, No. 1:13-cv-01236 (D.D.C. Nov. 12, 2013). As previously reported in this column, the department and several states alleged that the combination would substantially lessen competition for commercial air travel in many local markets and lead to higher prices and less service in violation of antitrust law. Among other things, the complaint had asserted that, following the merger, the combined airline would be less likely to offer discounts for connecting (one-stop) flights that compete with rival airlines' non-stop routes.

Under the settlement, American Airlines and US Airways must sell take-off and landing slots, gates, and ground facilities at seven airports around the country—including New York's LaGuardia Airport and Washington, D.C.'s Reagan National Airport—to government-approved buyers.

In a Competitive Impact Statement, filed in court with the proposed settlement, the department asserted that after the merger there will only be three major national "legacy" airlines ("New American," Delta, and United), and that in the wake of the merger, it would be easier for those airlines "to cooperate, rather than compete, on price and service." The department further emphasized that low cost carriers such as Southwest Airlines and JetBlue Airways "have less extensive networks and tend to focus more heavily on lower fares and other value propositions." To address these concerns, the divestitures were designed to "significantly strengthen" low cost carriers and "provide the incentive and ability for those carriers to invest in new capacity, and position them to provide more meaningful competition system-wide." The department added that the divestitures promised "to impede the industry's evolution toward a tighter oligopoly."

The department noted that slots at LaGuardia and Reagan National Airports are expensive and rarely change hands and that access to the divested airport assets will create opportunities and offer incentives for "carriers that will likely use them to fly more people to more places at more competitive fares." For example, according to the statement, Southwest and JetBlue will have the opportunity to obtain permanent access to slots they are now leasing from American. The statement observed that slots transferred to Southwest at Newark Airport in response to the department's challenge to the United and Continental merger in 2010 has led to new routes and lower fares out of

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that airport. The department added that these benefits could not be obtained by blocking the merger.

This proposed settlement demonstrates the complexity of fashioning competition-restoring relief for mergers in concentrated network industries. Antitrust merger enforcement, unlike actions challenging past conduct, is inherently prospective and uncertain because, whether a merger is approved, blocked, or, as here, restructured, future competition can be difficult to forecast with much precision. This case also reflects the tension between the regulatory and law enforcement aspects of merger review. Going to trial, by definition, introduces the risk of losing, in which case the government could not impose even modest regulatory conditions on the transaction.

No-Hire Agreement

A federal district court in California refused to dismiss a suit brought by the Department of Justice alleging that eBay, the online auction company, violated §1 of the Sherman Act by entering into a "handshake agreement" with Intuit Inc., a tax preparation and financial software provider, promising not to hire each other's employees. *United States v. eBay*, 2013-2 Trade Cases ¶78,530 (N.D. Cal. Sept. 27, 2013). But the court dismissed a related suit brought by California seeking injunctive relief against eBay because the state lacked standing. *California v. eBay*, 2013-2 Trade Cases ¶78,531 (N.D. Cal. Sept. 27, 2013).

The complaints alleged that eBay executives, including then-CEO Meg Whitman, and Scott Cook, founder and chairman of Intuit, first implemented a no-solicitation agreement in August 2006. In the following months, the parties allegedly continued to discuss recruiting and hiring, with their initial agreement "metastasiz[ing]" into a no-hire policy. Under the alleged agreement, eBay would not hire from Intuit, and Intuit would not recruit from eBay.

During the relevant time period, Cook sat on the boards of both eBay and Intuit. The court rejected eBay's claim that because the complaint reflected discussions solely between Cook and eBay executives, the agreement did not involve the "two independent centers of decision making" needed to establish an agreement in violation of §1. The court noted that the facts alleged supported a reasonable inference that Cook had the authority to bind Intuit to agreements and also that Cook had both complained to eBay and received complaints from eBay about the companies' compliance with the agreement.

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The court further rejected eBay's argument that §8 of the Clayton Act, which prohibits individuals from serving on the boards of multiple rival companies, precluded a finding of an actionable agreement. The court emphasized that §8 does not "provide complete immunity from antitrust scrutiny" for those who do not violate that particular statutory provision and noted that, in any event, neither party provided evidence that Cook's serving on both boards was acceptable under §8.

The court also rejected eBay's argument that the Justice Department had failed to state a claim because it did not allege facts sufficient to establish an antitrust violation under a rule of reason analysis. The court emphasized that plaintiffs are "not obliged to plead under each possible rule" and that prior to discovery, it could not determine with certainty the nature of the restraint, or the appropriate analysis to use, but in this case the government had sufficiently pleaded the existence of a restraint of trade subject to per se treatment. The court noted that "horizontal market allocation typically constitutes a per se violation" and that employment markets are not treated differently from other markets under antitrust law.

California argued unsuccessfully that it had standing to seek injunctive relief because the arrangement continued after an antitrust investigation into no-solicitation/no-hire agreements in the technology industry became public in 2009. The court noted that the government agency's announcement did not concern eBay in particular and did not constitute a legal determination that eBay's behavior amounted to an antitrust violation. Therefore, the court found that the state lacked injunctive standing because it had not demonstrated a threatened, forward-looking antitrust injury.

Casualty Insurance Software

Vedder Software Group, a company that produces software providing estimates to the casualty insurance industry, asserted that Xactware Inc., the marketer of a competing software program and various insurance companies that had an ownership stake in Xactware, conspired to require that their vendors not use Vedder's software program, or any other product that competed with Xactware's product. The district court dismissed the antitrust claims, and the Second Circuit affirmed in a summary order in *Vedder Software Group v. Insurance Services Office*, No. 13-1267 (2d Cir. Oct. 18, 2013).

The appellate court began by noting that Vedder did not allege an express agreement among the insurance companies, but rather relied upon allegedly parallel conduct to infer an agreement in support of its Sherman Act §1 claims.

The Second Circuit observed that parallel conduct is not itself an antitrust violation and that evidence of additional circumstances ("plus factors") is needed to raise a plausible suggestion that a preceding agreement existed.

The court noted that such plus factors can include a common motive, evidence showing that the parallel conduct was against a co-conspirator's apparent economic self-interest, and evidence of interfirm communications. The court stated that the facts relied upon by Vedder—that the insurance defendants had ownership interests in Xactware and that they allegedly demanded the use of its software by their vendors—did not plausibly support an inference of an agreement. The Second Circuit explained that the alleged demand by the insurance companies that their vendors use Xactimate was arguably in their self-interest, as it would ensure that the insurance companies used compatible software with their vendors. The demand therefore did not "tend to exclude" the possibility of independent, though parallel, behavior.

Baseball Antitrust Exemption

A federal district court dismissed federal and state antitrust claims brought by the City of San Jose against Major League Baseball (MLB) alleging that MLB's decision to prevent the Oakland Athletics from moving to San Jose perpetuated a local monopoly by the San Francisco Giants. The Northern District of California stated in *City of San Jose v. Office of the Commissioner of Baseball*, No. C-13-02787 (N.D. Cal. Oct. 11, 2013), that the antitrust claims were barred under a "longstanding antitrust exemption" that "encompasses all MLB decisions integral to the business of baseball."

The MLB is an unincorporated association of 30 Major League Baseball clubs, all of whom are bound by the Major League Constitution which provides that each team has a designated operating area. The city of San Jose is within the Giants' operating area. Because San Jose is outside the Oakland Athletics' operating area, the team's ability to relocate there depended on three-quarter majority approval from the 30 MLB clubs. In 2010 San Jose sought permission from MLB to relocate the A's to San Jose, and in 2011, the A's entered into a two-year option agreement with the city, with the option to renew for a third year, giving the A's the option to purchase land to build a stadium. San Jose alleged that the MLB intentionally delayed approving the relocation for more than four years, thereby preventing the A's from exercising their option to purchase the land. The city brought suit, arguing that the alleged restraints upon relocation violated §§1 and 2 of the Sherman Act and cost the city millions of dollars in new sales-tax revenue.

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In 1922, the Supreme Court held in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208-09 (1922), that baseball clubs are not subject to the Sherman Act because "the business of baseball is not engaged in interstate commerce." In subsequent opinions, the court upheld the exemption for baseball but declined to find that other sports were also exempt. In *Flood v. Kuhn*, 407 U.S. 258 (1972), the court abandoned its prior pronouncement that baseball was not engaged in interstate commerce, but found that given Congress's inaction in the 50 years since *Federal Baseball*, Congress intended baseball to remain outside the scope of antitrust regulation.

While the district court observed that baseball's antitrust exemption is "an aberration that makes little sense given the heavily interstate business of baseball today," it stated that it was "bound by the Supreme Court's holdings." Noting that prior Supreme Court rulings were "broadly decided," the district court rejected San Jose's argument that the exemption is limited to the reserve clause in players' contracts, which confines players to the club that has them under contract.

The court further noted that when given the opportunity to overturn the exemption in 1998, Congress "chose not to alter the scope of the exemption" from antitrust laws other than for issues that directly related to players' employment. Therefore, the district court concluded that "the federal antitrust exemption for the business of baseball remains unchanged" and dismissed the city's Sherman Act claims. The court also dismissed plaintiff's state antitrust claim under the Commerce Clause, finding that allowing such claim to proceed would "prevent needed national uniformity in the regulation of baseball."

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