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Court Tosses Transpacific Air Passengers' Claims Based on Alleged Overcharges for Flights Originating in Asia

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On May 9, 2011, the District Court for the Northern District of California dismissed with prejudice air passenger travel claims based on foreign injury in an **MDL action** alleging a ten-year international conspiracy among the airlines to fix the prices of transpacific air passenger travel. Memorandum Opinion, ***In re Transpacific Passenger Air Transp. Antitrust Litig.*****,** No. C-07-05634 CRB ("Mem. Op.").

The court drew the line at claims of injury based on "the overcharges associated with flights originating in Asia" and held that such claims of injury fall outside the Court's subject matter jurisdiction under the **Foreign Trade Antitrust Improvement Act ("FTAIA").**

To support their claims, Plaintiffs had first argued that they satisfied the import trade exception to the FTAIA's subject matter jurisdiction bar. *See* **15 U.S.C. § 6a ("Section 1-7 of [the Sherman Act]** shall not apply to conduct involving trade or commerce (***other than import trade or import commerce***) with foreign nations…") (emphasis added). Turning to the dictionary definition of "import" as a verb, plaintiffs had argued that the word means "to bring in; to introduce from a foreign or external source," and that the delivery of air passengers from airports in Asia to airports in the United States and vice versa thus involves import trade. Mem. Op. at 5 (internal quotations and citation omitted). The court found this definition unpersuasive.

In rejecting application of the **"import trade" exception,** the court explained that plaintiffs failed to take account of the significant difference between cargo, to which their definition of "import" commonly applies, and people. *Id.* at 6 ("air passengers are not products like the oriental rugs that were found to be the object of import commerce in *Carpet Group*, 227, F.3d at 72…"); *see also id.* (import "generally denotes a product (or perhaps a service) [that] has been brought into the United States from abroad") (quoting ***Turicentro S.A. v. Am. Airlines Inc.*****,** 303 F.3d 293, 303 (3d Cir. 2002)). The court explained that the focus of the FTAIA inquiry is on whether defendants' conduct, not plaintiffs', involves import trade, and that defendants' relevant conduct of air passenger transportation could not fairly be equated with "importing of people." *Id.* at 6-7.

The court also rejected plaintiffs' reliance on the "domestic effects" exception to FTAIA's jurisdictional bar. This exception required plaintiffs to show that "the effects on U.S. commerce or American interests engaged in foreign commerce must be direct, substantial and reasonably foreseeable – not

minor impacts – and it must give rise to the antitrust claims." ***In re Dynamic Random Access Memory (DRAM) Antitrust Litig.***, 546 F.3d 981, 986 (9th Cir. 2008). To support their argument that they satisfied this exception, plaintiffs made two assertions. First, they alleged that U.S. residents and citizens paid more for air passenger transportation. Second, they alleged that "travelers using price-fixed air transportation services are able to allocate a smaller fraction of their total travel budget to the purchase of commercial goods and services during their stay in the United States." *Id.* at 7 (internal quotation marks and citation omitted).

Turning to the first prong of the exception, i.e., the "directness" of the asserted effect on U.S. commerce, the court rejected the second allegation out of hand, explaining that such an asserted effect "is entirely indirect" and based on "numerous speculative assumptions about travelers' spending habits." Mem Op. at 8. However, the court found plaintiffs' the assertion that U.S. residents and citizens paid more for air passenger travel sufficiently satisfied the "directness" requirement. *Id.*

The court nonetheless found the exception inapplicable because plaintiffs could not show that it was the "domestic effects" of the alleged conspiracy that caused the foreign injury, rather than "the same overall price-fixing conspiracy that caused the domestic effect." *Id.* at 10. Here, the court rejected plaintiffs' claim that "prices for travel originating in foreign countries and travel originating in the United States are inextricably bound up with and dependent on each other" because "the seats on Defendants' planes simultaneously carry passengers whose travel originated in foreign countries as well as those whose travel originated in the United States." *Id.* at 10 (internal citation and quotation marks omitted). The court explained, "'bound up,' even very bound up, is not proximate causation." *Id.*

Finally, the court also concluded that plaintiffs lacked antitrust standing largely for the same reasons, observing that the standing analysis "implicates many of the same issues as the jurisdictional analysis under the [FTAIA]." *Id.* at 12 (internal quotation marks and citation omitted). The court turned to the five factors relevant to determining whether a plaintiff has antitrust standing: (1) the intent of the alleged conspirators (here to fix prices of both domestic and foreign flights); (2) the directness of the injury (here caused by the same alleged conspiracy, not domestic effects of that conspiracy); (3) the character of the damages (here the allegedly higher prices for flights originating outside the U.S.); (4) the existence of more appropriate plaintiffs (here those persons allegedly overcharged for flights originating in the U.S.); and (5) nature of the plaintiffs' claimed injury (here foreign injury). *Id.* at 13.

Although the court found nearly all factors to be lacking, it gave particular weight to the nature of plaintiffs' injury being foreign. *Id.* at 13 (noting, "The last factor is one of 'tremendous significance.'"). Because "Plaintiffs' injuries were not caused by the domestic effects of the conspiracy," the court concluded that the foreign nature of their injury was "fatal" to their antitrust standing. *Id.* Accordingly, the court dismissed plaintiffs' foreign injury claims with prejudice.

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