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U.S. Court Grounds Europe-Japan Air Travel Price-Fixing Case

On October 16, 2009, Judge Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania ruled that the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA") mandated dismissal of a putative class action brought against foreign airlines Lufthansa, Air France, KLM, and Alitalia under the Sherman Act for allegedly conspiring to fix the price of Europe-to-Japan and Japan-to-Europe passenger air transportation. *McLafferty v. Deutsche Lufthansa A.G.*, CV 08-1706 (E.D. Pa., October 16, 2009).

Plaintiff purported to bring the action on behalf of all persons who, while in the United States, purchased Europe-Japan airplane tickets directly from the defendants. The defendants moved to dismiss the action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In their briefing in support of the motion, the defendants noted their belief that the Court lacked subject matter jurisdiction under the FTAIA, but did not assert this as a basis for dismissal. The Court, citing its continuing duty to ensure that jurisdiction is present and acting *sua sponte*, ordered supplemental briefing on the application of the FTAIA.

The Court applied the FTAIA's two-step test for determining whether a claim falls outside the jurisdiction of United States antitrust laws. The Court began by applying the FTAIA's first prong, which asks whether the defendants' alleged conduct constituted "trade or commerce (other than import trade or import commerce) with foreign nations." *Id.* at 4. The Court concluded that the defendants' alleged conduct met this description, rejecting the plaintiff's argument that, because she was in the United States at the time the defendants sold her the tickets, her claim was based on "import trade or commerce." The Court reasoned that a ticket to fly between two foreign countries, "even if purchased from and then delivered to the United States," does not qualify as an import transaction "because the ticket has no value apart from the service it entitles its bearer," and therefore purchasing such a ticket "does not bring any goods or services to the United States." *Id.* at 7. By contrast, the service provided in the transaction—travel between two or more foreign countries—"is only provided wholly outside the United States." *Id.*

The Court then proceeded to apply the FTAIA's second prong, asking whether the defendants' conduct involved a "direct, substantial, and reasonably foreseeable" anticompetitive effect on United States commerce. The Court found that this prong was not satisfied, concluding that the plaintiff's alleged injury occurred entirely in a non-U.S. market--the market for Europe-Japan passenger airfare. The Court emphasized that "[t]he fact that the supra competitive prices were paid by persons in the United States does not establish, or even intimate, that the conspiracy

directly affected United States commerce." *Id.* at 10.

Judge Pollack's ruling is the latest in an ongoing struggle by courts to interpret and apply the "inartful" language of the FTAIA. The opinion provides one of the most direct answers to date to what has been an arguably unsettled question—whether a plaintiff's payment of supracompetitive prices while in the United States, for a good or service that is otherwise transacted entirely in foreign markets, is a sufficient "effect" on U.S. commerce to justify U.S. antitrust jurisdiction under the FTAIA.

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