

Client Bulletin

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Antitrust Claims Dismissed Against Carrier Following Termination Of Travel Agent's Volume Override Commission Agreement

The airline industry and travel agents in particular are becoming well accustomed to carriers paying low or no base commissions for the sale of airline tickets. Due to changes in the airline ticket distribution system, most notably caused by an increase in internet sales, base commissions have become a thing of the past. Historically, base commissions were paid by the carrier upon the sale of tickets and were usually established as a set percentage of ticket prices. Base commissions, as well as override commissions (incentive payments in return for an agency meeting specified sales quotas on particular routes or overall sales levels), are memorialized in commission agreements which set forth the particular terms for commission payments. Although the airline industry is moving away from commission agreements, courts have been faced with antitrust allegations arising from ticket distribution and commission agreements.

The United States District Court for the Eastern District Court of New York recently decided an antitrust claim in favor of LOT Polish Airlines (LOT) and dismissed plaintiff's claims of conspiracy between the airline and plaintiff's competitor travel agents in violation of the antitrust law. In *Jan Tokarz d/b/a JJ Store v. LOT Polish Airlines*, No. 96-CV-3154 (E.D.N.Y. Sept. 29, 2006), the federal court found that LOT did not commit an antitrust violation when the airline terminated plaintiff's Volume Override Commission Agreement (VOCA).

Plaintiff contended that LOT conspired with competing travel agents to fix retained commissions and ticket prices and did so by terminating plaintiff's VOCA. According to

plaintiff, LOT terminated his VOCA after receiving a letter signed by six competing travel agents, complaining that plaintiff was discounting tickets well below LOT's published fares in violation of the VOCA. Plaintiff alleged that all the travel agents used their respective base commissions to discount tickets in violation of the VOCA and that LOT's inconsistent enforcement of the VOCA provision prohibiting such conduct evidenced that LOT was colluding with plaintiff's competitors in an attempt to fix commissions and ticket prices.

In reality all the travel agents used a percentage of their respective base commissions to discount tickets, but plaintiff passed all of its base commissions on to its customers, thereby making no front-end profits on ticket sales. Plaintiff's business scheme was that he would forgo his entire base commission by deeply discounting the tickets he sold and expecting to do business in a volume sufficient to earn back-end or override commissions. Moreover, the deep discounting of LOT airline tickets would drive competitors out of business, or at least dissuade plaintiff's competitors from selling tickets on LOT since they would be unable to meet plaintiff's discounted prices.

As the court noted, an agent who fails to make front-end profits on ticket sales is a credit risk in that part of the agent's weekly remittances would have to come out of the agent's own pocket. Agents who sell below their own cost put an airline at risk and disrupt the incentive of other travel agents to sell a particular carrier's tickets. LOT requested plaintiff on several occasions to stop discounting tickets, but plaintiff ignored such requests. After receiving a complaint from competing travel agents and after LOT's request to plaintiff to stop discounting tickets were ignored, LOT terminated plaintiff's VOCA. As a result, plaintiff commenced a lawsuit against LOT, alleging breach of contract and conspiracy in violation of the antitrust law.

The court found that plaintiff failed to demonstrate that LOT terminated its VOCA in furtherance of a common plan with others and, therefore, did not conspire to fix either retained commissions or ticket prices in violation of U.S. antitrust laws. Briefly stated, U.S. antitrust laws provide that any contract or conspiracy that restrains trade or commerce is illegal. If LOT was found to have violated the antitrust laws, plaintiff would have been entitled to treble damages. In other words, plaintiff's award could have totaled three times the amount it could prove in damages.

The court noted that a single entity, such as LOT, has a right to deal, or refuse to deal, with whomever it likes, so long as it does so independently. Moreover, an entity can announce its resale prices in advance and refuse to deal with those who fail to comply. The only evidence offered to suggest that LOT's action was anything other than unilateral was a complaint by plaintiff's competitors, culminating in the letter to LOT and LOT's inconsistent enforcement of the VOCA provision prohibiting discounting. The court found no evidence that the competitors' letter was anything more than a complaint. It did not threaten that the travel agents would stop doing business with LOT unless plaintiff's VOCA was terminated. The court further noted that such "complaints about price cutters are natural – and from the manufacturer's perspective, unavoidable reactions by distributors to the activities of their rivals".

With regard to LOT's enforcement of the VOCA provision prohibiting discounting, the court accepted LOT's explanation that plaintiff's drastic price-cutting practices justified a departure from LOT's usual indifference to its agents' use of their commissions to create customer discounts because of the credit risk that plaintiff's practices posed.

Accordingly, the court dismissed the antitrust claims, allowing plaintiff to recover only for the unpaid commissions it was owed under the terms of the VOCA until the date of termination.



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